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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1938.

No. 534.

RAY INGELS, as Director of the Department of Motor Vehicles of the State of California; HOWARD E. DEEMS, as Registrar of the Department of Motor Vehicles of the State of California, and LON W. BUTLER, as Manager of the Los Angeles Office of the Department of Motor Vehicles of the State of California,

Appellants,

vs.

PAUL GRAY, INC., a California corporation; AL ASHER; HIRSCH MERCANTILE COMPANY, a California corporation; MELVIN E. SNYDER, an individual doing business under the firm name and style of United Auto Sales; KELLEY KAR COMPANY, a California corporation; L. H. THAYER; NATIONAL MOTOR CAR COMPANY, a California corporation; SAMUEL A. KLEIN, an individual doing business under the firm name and style of Klein Auto Company; BILL SANELLA; C. O. MACE; RAY CULBERTSON and JACK PARMILEE, a copartnership doing business under the firm name and style of Culbertson & Parmilee Motor Sales; E. F. PORTER; DON CARDIFF and F. A. RODGERS, a copartnership doing business under the firm name and style of Cardiff & Rodgers; and MOTOR TRADING COMPANY, a California corporation,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF OF APPELLEES.

With Appendices.

EVERETT W. MATTOON,
Los Angeles, California,
Attorney for Appellees.

Parker & Baird Company, Law Printers, Los Angeles.

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BRIEF OF APPELLEES.

Opinion.

The opinion of the District Court is reported in 23 Fed. Supp. 946 [R. 36], and the dissenting opinion at page 950 [R. 43].

Jurisdictional Statement.

Statement as to jurisdiction was filed as required by Rule 12 and probable jurisdiction was noted on January 9, 1939.

Statement of the Case.

This is an appeal from the final decree of a district court of three judges (Judicial Code, Section 238 (3) and 266; U. S. C., Title 28, Sections 345 (3) and 380), which enjoined appellants, defendants below, officers of the State of California, from enforcing against appellees the provisions of Chapter 788, page 2253, Statutes of 1937 of the State of California [Appendix A p. 75 *et seq.*], as an unconstitutional burdening of interstate commerce and unconstitutional infringement of appellees' rights under the equal protection of laws and due process clauses of the Fourteenth Amendment of the United States Constitution.

The Statute in Question.

As stated in appellants' brief the Act in question is known as the Caravan Law, which became effective July 2, 1937 [Appendix A p. 75]. It was enacted after the 1935 California Caravan Law [Appendix B p. 81] was held unconstitutional by this Court on March 1, 1937, in *Ingels v. Morf*, 300 U. S. 290.

As pointed out by appellants, two principal changes were made in the statute:

(1) The $15.00 fee charged by the 1935 Act was divided into two $7.50 fees by the 1937 statute, one being recited to be compensation for the privilege of using the public highways and the other reimbursement "for expense incurred in administering police regulations pertaining to the operation of vehicles moved pursuant to such permits

and to public safety upon the highways as affected by such operation." [Section 4, Appendix A p. 76]. This admittedly was an attempt to overcome the charge of excessiveness of the fee, held to invalidate the statute in *Ingels v. Morf, supra.*

(2) Instead of limiting the definition of caravaning to transportation of cars "from without the state," the limitation "from without the state" was removed in the attempt to make it appear that it applied throughout the state. By the provisions of section 8, however [Appendix A p. 78] the statute was made inapplicable in any intrastate transportation of cars except as between two zones; or, in other words, when cars are moved from the northern to the southern part of the state, or vice versa. (The zone boundary line practically divides the state in two, as shown on a map set forth opposite page 32 of appellants' brief.) While this Court in *Ingels v. Morf, supra,* did not pass upon the discrimination point, the attempt was made to remove the vulnerability of the statute to this charge. The same method of defining the cars subjected to the payment of the fees is used in the 1937 statute as that employed in the 1935 Act. They are defined as those transported "for the purpose of selling or offering the same for sale."

Statement of the Facts.

Appellees, consisting of five California corporations, two groups of copartners, and seven individuals, are engaged in the business of buying, selling and trading motor vehicles, and in the usual course of such business drive into the State of California from outside thereof automobiles for the purpose of resale, which automobiles are sought to be subjected to the imposition of certain license fees or taxes by the requirements of Chapter 788 of the California Statutes of 1937, commonly known and referred to as the Caravan Law [Appendix A p. 75]. After the effective date of said statute one of the plaintiffs purchased an automobile in Detroit, Michigan, and caused the same to be driven on its own wheels in convoy with other caravaned automobiles from the starting point of purchase into the State of California where it crossed over the California state line on or about July 6, 1937, at Yermo Station No. 8, and was thence driven on its own wheels to its destination in Los Angeles, California, for the purpose of resale. [R. 3.] Demand was made by the Registrar of the Department of Motor Vehicles of the State of California that the said plaintiff obtain a permit for the said automobile demanding that plaintiff pay a charge of fifteen dollars ($15.00) for such permit, plus a fifty per cent (50%) penalty of seven dollars and fifty cents ($7.50) for not having obtained the permit on said car prior to the entry of the vehicle into California, and the said Registrar threatened seizure and sale of the said vehicle for fees due in accordance with said Caravan Law. [R. 4.]

Each of the plaintiffs is engaged solely in the business of buying, selling and trading motor vehicles and has been so engaged for many years. [R. 6.] Plaintiffs, and each of them, from time to time in conducting their business

have purchased motor vehicles which were previously registered in a state other than the State of California and caused the same to be caravaned into the said state from other states on their own wheels or in tow of other motor vehicles for the purpose of resale. [R. 7, 63.] (The foregoing brief statement is compiled from uncontroverted allegations of the Complaint, and from the Findings of Fact.)

Approximately fifteen thousand vehicles enter the State of California each year for the purpose of sale. [See stipulation R. 81, and analysis of figures in this brief; *post*, p. 42]. Of these fifteen thousand vehicles three thousand are brought into the State of California singly, each in charge of a separate driver and not in convoy with other cars or as a part of any fleet or group movement; of the remaining twelve thousand cars, six thousand are moved singly, each car having a separate driver, but in convoy of varying numbers between ten and twenty; the remaining six thousand are in convoy and moved in two's, the rear car being coupled with the one in front, with one driver to each unit. These proportions or percentages apply to the movements of all cars brought into California from without the state for the purpose of sale. They were set forth in a stipulation presented at the outset of the trial. [R. 72-75.] They state the proportion of those cars brought in singly and not in fleet or group formation by these appellees as well as by all other importers of for-sale cars. This was the purpose of the stipulation, *i. e.*, to have the facts before the Court for adjudication as to the

issue of discrimination. Appellants attempt to evade this issue and contend that the stipulation had no relation to appellees' operations. (App. Br. pp. 6, 44, 45.) For analysis and discussion of the stipulation, see *post* herein, p. 49 *et seq.*

The plaintiffs (appellees here) put one of their number (Al Asher) on the witness stand to testify as to the manner in which he transports those cars which are brought in in fleet or group formation. [R. 105-107.] It was stipulated that the rest of the plaintiffs would testify in substance and effect the same. [R. 107.] The witness Asher testified that he has been engaged in the caravaning of automobiles into California since 1930 and that during that time he has caravaned in over 4,000 cars. He has purchased perhaps a dozen caravans personally and those were conducted to California personally, "by myself." [R. 105.] The majority of his cars come from Detroit. They are used automobiles. He selects the drivers himself. He personally interviews applicants obtained by advertising in a Detroit newspaper and selects not over half the applicants. His requirements are that the driver must be 21 years of age, or over, and must have a driver's or chauffeur's license in the state from which he starts. He prefers men from 30 to 40 years of age. The cars he purchases cost him from $600 to $1,000, at least. He carries insurance on his cars as follows: ten thousand to twenty thousand public liability, and five thousand property damage, but no collision insurance for his own cars. During the time he has caravaned cars into California he has had only two small claims for damages occasioned by his cars in transit, each of them less than $50.

Upon the subject of safety precautions enforced by him Mr. Asher testified that he puts a man in front to set the

pace and govern the speed on the road and he rides at the rear end with a single automobile, in order to take care of all the details and keep the drivers in line and obeying the speed laws. The instructions he gives are to keep the length of two telephone poles apart, at least, and that they are not to park except in proper places, and to keep on the right side of the highway. During the period that he has caravaned cars into California he has never had a highway patrolman as an escort of any caravan he conducted. [R. 105-107.] The foregoing evidence, of course, applies only to the cars brought in in fleets or groups, and does not relate to those cars driven in singly and unaccompanied, even though to be offered for sale.

Some comment appears desirable as to the review of the evidence in appellants' statement of the case. (Brief pp. 6-8.) As to movements of for-sale cars in fleet formation which originate and move entirely within the state (for the purpose of avoiding the charge of discrimination in relation to which the creation of the two zones was set up) appellants state that there is a "recognized and noticeable" movement of that character (App. Br. p. 8) and refer to the Ingels and Bates affidavits. [R. 113, 114, 156.] In the Ingels affidavit, however, he refers to any such as "occasional movements" [R. 113] and in the Bates affidavit he qualifies any such movements as being "under certain circumstances." [R. 156.]

As to movements entirely within the state and "intrazone," large numbers of motor vehicles (both automobiles

and trucks) are moved for the purposes of sale. As to the new cars alone, and applying to one zone only, and those moved by only two manufacturers, approximately three times the number of for-sale cars brought in from outside the state are moved within Zone 1. [R. 77, 119.] For an analysis of the numbers of vehicles so transported, see *post* in this brief, p. 42. The conclusion of the trial court was that the number is at least five times that of the outside for-sale cars [R. 40]. As to the character of the method of moving these cars, while no well defined fleet formation is followed, there is evidence that there are movements in groups. The witness Murchison, in answer to the question as to whether they move in groups of two or more, testified "two or three or four." [R. 77.] In the Ehlers affidavit he stated that the deliveries "were never made by grouping more than three such vehicles in a fleet" [R. 137], and in the Bates affidavit it was said that they are "never in groups of more than four cars" [R. 155.] In addition to the moving of these cars on their own wheels for purposes of sale, the evidence shows that as many as six are loaded on a truck-trailer unit and delivered in that way [R. 77-78].

In appellants' brief (p. 8) emphasis is placed upon the asserted short distances of the intra-zone deliveries, but by their own analysis of the Holm affidavit [R. 122] 22.3 per cent are driven over 100 miles and 11.2 per cent over 150 miles in Zone 1 (App. Br. p. 34). The air-line radii shown on the map in appellants' brief (p. 32) are not, of course, fair or accurate indications of actual driving distances.

The Issues.

I. Issues as to three kinds of discrimination are present in this case:

(1) Discrimination resulting from the attempt to create a distinction between (a) the entire interstate movement of for-sale cars (including those moved in fleet formation as well as those moved otherwise) and (b) the movement of all for-sale cars taking place wholly within the state;

(2) Discrimination between (a) those cars driven into the state singly (not in fleet formation) for the purpose of sale and (b) those driven singly solely within the state for like purpose

(3) Discrimination between (a) those driven into the state singly for the purpose of sale and (b) those driven in singly for a purpose other than that of sale.

II. There is the issue that the fee exacted is not confined to compensation. It can be "valid only if compensatory."

III. There is the issue that the provisions of the statute are not severable. Being basic, the defects invalidate the entire Act.

Summary of Argument.

I.

The classification attempted by the statute is invalid because arbitrary and discriminatory.

(a) The creation of the two intrastate zones by the new Caravan Law of 1937 was an attempt to create a distinction where none in fact exists in the effort to make it appear that movements of for-sale cars entirely within the state receive the same treatment as those brought in from without.

(b) The statute violates the commerce clause by prescribing in effect not the manner of use but the persons by whom the highways may be used, which was held to be offensive by this Court in *Buck v. Kuykendall.* Its primary purpose is the prohibition or restriction of competition.

(c) The attempted classification denies equal protection of the laws, being a palpably arbitrary attempt to distinguish where no ground of distinction exists and lacking proper relation to the purpose for which made, resulting in discrimination of the same character as that which this Court held to invalidate the Florida statute in *Smith v. Cahoon.*

(d) The distinction attempted to be drawn between interstate movements of for-sale cars and intrazone movements within the state results in discrimination, there being no substantial difference as related to safety of the highways when numbers and methods are compared.

(e) The arbitrary discrimination between appellees' cars and other out-of-state-registry cars driven singly, *i. e.*, not in fleet formation or in convoy or company with other cars, invalidates the statute.

(f) The arbitrary classification is not to be excused on the ground that "variations and departures" and incidental injustices are permissible because here the limits of the necessary element of reasonableness are transgressed.

II.

The exaction of the fees in the amounts and in the manner attempted invalidates the statute.

(a) The fee exacted for traffic regulations and enforcement of the Act is excessive and unlawfully burdens interstate commerce and violates the equal protection and due process clauses of the Fourteenth Amendment. The evidence did not show that the expenditure of the substantial amount claimed was either necessary or actually made for any purpose attributable to the enforcement and regulation required.

(b) The fee exacted for the privilege of using the highways is invalidated by the arbitrary discrimination in favor of other single cars of outside registry driven into the state.

III.

The basic defects of the statute as a whole destroy its severability and prevent the holding of any of its provisions valid or operative.

ARGUMENT.

I.

The Classification Attempted by the Statute Is Invalid Because Arbitrary and Discriminatory.

Appellees contend that the so-called Caravan Law is definitely discriminatory, that this discrimination not only offends the commerce clause (Art. I, Sec. 8 of the Constitution of the United States), but that it also violates their guarantee of equal protection of the laws and deprives them of their property without due process of law, in contravention of the Fourteenth Amendment.

A very real and substantial right of the appellees is invaded by the improper burdening of their interstate commerce here attempted. That this Court has consistently recognized this right and guarded against its violation is illustrated by the following quotation from a former decision contained in the recent case of *Southern Pacific Co. v. Gallagher* (decided January 30, 1939) ..... U. S. ....., 83 L. Ed. Advance Opinions 352, at 358:

> "The protection against imposition of burdens upon interstate commerce is *practical* and *substantial* and extends to whatever is necessary to the complete enjoyment of the right protected." (Italics supplied.)

Definite limitations are thrown around the imposition by states of compensatory charges where interstate commerce is affected. As stated by this Court in the recent case of *Dixie Ohio Express Co. v. State Revenue Com.*, decided January 30, 1939, ... U. S. ....., 83 L. Ed. Advance Opinions 367, 369 (quoting from the leading case of

Hendrick v. Maryland, 235 U. S. 610), their amount and the method of collection are held to constitute no burden upon such commence *only*.

> "so long as they are *reasonable* and are fixed according to some uniform, *fair* and practical standard." (Italics supplied.)

Also, in safeguarding the guaranties of the Fourteenth Amendment *reasonableness* is made a *sine qua non* of any valid classification.

> "While *reasonable* classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a *reasonable* and *just* relation to the things in respect to which such classification is imposed." (Italics supplied.)
>
> *Southern Railway Co. v. Greene*, 216 U. S. 400, at 417.

We submit that these well established principles have been violated in the attempted exactions of the Caravan Law.

The Caravan Law is directed at those who move for-sale motor vehicles on their own wheels on the highways in interstate commerce, including such movements as may take place from the northern to the southern part of the state, or vice versa, these being designated "inter-zone movements." No permit is required or fee charged for any movements entirely within the state, unless the one inter-zone boundary line is crossed. All intra-zone movements, covering areas larger than many entire states, are

exempted entirely and motor vehicles can be transported for sale at will from any one point to any other point within either of the two zones.

In addition, the Caravan Law is directed at those who drive for-sale cars into the state singly and not in any caravan formation, while cars moved singly for other purposes are exempted from its operation.

(1) THE DISTRICT COURT'S FINDINGS OF FACT SHOULD NOT BE DISTURBED.

While appellants do not treat the findings of fact separately in their brief, but merely refer to them in three instances in their argument (pp. 25, 27 and 43), we shall take them up briefly at this time and make further reference to the record upon disputed points throughout the argument.

It is of course elementary that, where there is any evidence to support a finding of fact which has been found by the trial court, this Court will not disturb it on appeal. In the case of *Dooley v. Pease,* 180 U. S. 126, this Court said (at 131):

> "Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different . . . (citing cases).
>
> "Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals or by this court, if there is any evidence upon which such findings could be made . . . (citing cases)."

See, also:

4 *Corpus Juris* p. 857.

We now refer to the findings in consecutive order.

Findings of Fact Nos. I, II, III, IV and V.
[R. 57-63.]

These findings are not disputed.

Finding of Fact No. VI.
[R. 63.]

Appellants object to this finding on pages 25 and 43 of their brief. They do not dispute the fact that plaintiffs are engaged in the business of buying, selling and trading motor vehicles and have been so engaged for many years, or that in the conduct of such business they purchase motor vehicles previously registered in other states and cause them to be caravaned into California on their own wheels for the purpose of sale. Their objection to the remainder of the finding is refuted by the stipulation covering the facts entered into by the parties at the outset of the trial. [R. 72-75.] (For discussion of this, see *post* p. 48 *et seq.*)

Finding of Fact No. VII.
[R. 63.]

Appellants assert that this finding is without support in the evidence (Brief p. 27). That the movement of cars between zones is negligible is admitted by appellants' own evidence. In the Ingels affidavit it is referred to as an "occasional movement" [R. 113] and in the testimony of Captain Personius, who supervises the enforcement of the Caravan Law in Zone 2 which includes the forty-seven northern counties of the state [R. 81], he stated that he drew a distinction between intra-zone traffic and interstate traffic in so far as caravans are concerned "because of the

fleet movement of cars coming from without the state" [R. 82]. In the Bates affidavit he limits his reference to interzone movements to "certain seasons in the year" and "under certain circumstances" [R. 156].

That part of the finding as to there being approximately 4,000 cars transported monthly and using the highways of Zone 1 is supported by the evidence of the witness Murchison [R. 77] and the affiant Shaw [R. 119]. (See discussion, *post* on p. 42.) That intrazone movements are often made in convoys is shown in the testimony of Murchison [R. 77] where he stated that group movements of "two or three or four" were made, and in the appellants' affidavits of Ehlers and Bates, the former stating that such movements "were never made by grouping more than three in a fleet" [R. 137] and the latter that the movements are "never in groups of more than four cars" [R. 155]. That many of these intrazone delivery movements are in distinctly congested districts is shown by repeated statements that they are through "metropolitan areas" found in practically each affidavit filed. An example is the Shaw affidavit, relating to the deliveries for the General Motors Corporation plant. He stated that "drive-away" deliveries are usually for delivery within the Los Angeles metropolitan area [R. 119]. In the Busby affidavit it was stated that deliveries of cars within the metropolitan area are usually made by the drive-away method [R. 126], and that cars delivered on their own wheels within such metropolitan area are delivered singly or in units of two, three or four cars [R. 127]. The finding that many are moved

for considerable distances is supported by the various affidavits as to deliveries, the one chosen by appellants themselves in support of their contention revealing that 22.3 per cent are driven over 100 miles and 11.2 per cent over 150 miles. [Holm affidavit R. 122, as analyzed App. Br. p. 34.] (See discussion, *post* at p. 44.)

Finding of Fact No. VIII.
[R. 64.]

This finding is not disputed in the argument presented in appellants' brief, but it is stated in paragraph 7 of the Assignment of Errors (Brief p. 10) that it is not supported by adequate evidence. Appellees' witness Gray testified that the net profit his company made on each transaction in bringing in automobiles to California for sale is "approximately $10.00 per car" [R. 108]. He also testified that the reason he had only caravaned 19 cars since the Act went into effect was "because of the statute" [R. 108].

Finding of Fact No. IX.
[R. 64.]

This finding is challenged by appellants on page 25 of their brief. It finds that the number of the caravan cars brought into the state for the purpose of sale and subject to the imposition of a fee of $15 creates no traffic problem differing in any way from the traffic problems created by the movement of cars intrazone. In other words, when the volume of cars moved and the methods employed in moving them are considered, no problem of any difference is presented by the movement of those from which the fee is exacted as compared with that of the for-sale cars transported within a zone. This finding involves a considera-

tion and a weighing of the entire evidence, with the element of its credibility entering in. It involves a comparison of the movements of interstate and intrastate for-sale cars and their relation to traffic problems. The District Court obviously weighed the nature of the interstate movements as testified to by Asher [R. 105-107] and as revealed elsewhere in the evidence and concluded that the character of the problem presented by the local deliveries of for-sale cars as illustrated, for example, by the Murchison testimony [R. 77-78] was just as great. Another illustration is that of the intrazone deliveries of trucks as the movement is revealed by the stipulation [R. 81]. A substantial majority of the 150 moved per month are in units of two, connected by tow-bars. It was admitted by the witness Personius that "the pleasure vehicle is not a greater hazard than a truck towing a trailer on the same highway" [R. 91] and here two entire trucks are joined together in the delivery movement.

Findings of Fact Nos. X and XI.
[R. 64.]

These findings are not disputed.

Finding of Fact No. XII.
[R. 64.]

This finding is attacked in appellants' brief at pages 25 and 43. They assert that there is no evidence to support it. There is evidence in various instances throughout the record that the caravaning of cars does not create a traffic problem necessitating special policing of the caravans or create an additional hazard to passing traffic or other users of the highway. The witness Asher testified very clearly

concerning the orderly movement of the caravans and the care taken in the conduct of their movement and it was stipulated that the other plaintiffs would testify likewise. [R. 105-107.] That just ordinary traffic regulation is given was admitted by appellants' witness Captain Personius when questioned by Judge Wilbur [R. 92]. When asked whether his men were used at any particular place at the border stations his answer was "No." Judge Wilbur: "Not in assisting the caravan fleets in going to their places of destination, were they?" A. "No, just traffic duty from those movements." Judge Wilbur: "Just the general traffic duty?" A. "Yes, sir." In other words, the same duty as would be required and furnished for *any* appreciable volume of traffic on the highways. Again [R. 94] Personius plainly revealed this when he testified as follows:

> "Q. What would the patrolmen be up there for; would it be for the purpose of attempting to collect any fees which might be due the State of California, for automobiles transported into this state for the purpose of sale? A. No, sir. He is not allowed to collect fees on the highway.
>
> Q. Would it be just for the purpose of assisting in the handling of the traffic? A. Yes, sir; assisting and aiding in the handling of the general traffic."

The witness appeared to be quite inconsistent as to the purpose of putting on the men, whether it was to safeguard traffic or just because the Caravan Law had been passed [R. 93]. He stated that they were "put on for the enforcement of the Caravan Law, and the traffic," but when

asked the question, "Captain, the mere fact that the Caravan Act was passed in 1936 did not increase the traffic in that district, did it?" he replied "No. It did not increase the traffic." When asked "You know it decreased the traffic, do you not?" he answered "I have no figures on that." But Chief Cato stated that after the adoption of the Act in 1937 "the volume of such traffic materially decreased" [R. 159]. The confusion is obvious. Not the traffic problem but the passage of the Act led to the putting on of the men.

The finding that movements in fleets do not create undue wear or tear on the highways is supported by the testimony of Asher as to the manner of conducting such movements [R. 106-107]. There is a noteworthy absence of *any* evidence from defendants on this subject.

Finding of Fact No. XIII.
[R. 65.]

This finding is declared to be unsupported by evidence on page 27 of appellants' brief, and is dismissed without specific references to any of its eight paragraphs. They cover the findings of discrimination, denying of due process and equal protection, imposition of disproportionate and arbitrary and unfair fees, and unconstitutional burdening of interstate commerce. As these matters are discussed at length in this brief, with references to the evidence supporting them, appellees will follow the plan of appellants and not review here the various detailed portions of the evidence separately.

(2) A Classification Cannot be Discriminatory.

At the outset in their brief appellants stress the decision of this Court in *Continental Baking Co. v. Woodring*, 286 U. S. 352, 76 L. Ed. 1155, 52 S. Ct. 595, in support of their contention that the classification is proper. Appellees, of course, concede that the state has authority to impose reasonable restrictions upon the movements of motor vehicles, requiring compensation for its facilities and regulating the use of its highways to promote the public safety, as pointed out therein. And, as a general statement, it is well established that motor vehicles may properly be treated as a special class, for the reason pointed out by this Court:

> "because their movement over the highways is attended by constant and serious dangers to the public and is also abnormally destructive to the ways themselves."
>
> *Continental Baking Co. v. Woodring, supra,* at 366.

This is supported by numerous decisions, including *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. Ed. 385, 35 S. Ct. Rep. 140; *Kane v. New Jersey*, 242 U. S. 160, 167, 61 L. Ed. 222, 37 S. Ct. Rep. 30; *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 69 L. Ed. 445, 45 S. Ct. Rep. 191; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 72 L. Ed. 551, 48 S. Ct. Rep. 230; *Sprout v. South Bend*, 277 U. S. 163, 72 L. Ed. 833, 48 S. Ct. Rep. 502; *Hodge Drive-It-Yourself Co. v. Cincinnati*, 284 U. S. 335, 76 L. Ed. 323, 52 S. Ct. Rep. 144.

But the *Continental Baking Co.* case stressed by appellants definitely qualifies its recognition of the state's authority as follows:

> "Reasonable regulations to that end are valid as to intrastate traffic and, *when there is no discrimination against interstate commerce which may be affected,* do not impose an unconstitutional burden upon that commerce." (Italics supplied.)
>
> *Continental Baking Co. v. Woodring, supra,* at 366.

It is our contention that the interstate commerce of appellees is clearly discriminated against. They bring in cars from outside the state for the purpose of sale. They are subjected to the payment of the $15.00 fee. Others manufacture and assemble motor vehicles within the state and transport them there for sale in far greater numbers and in a manner not reasonably distinguishable with relation to considerations of safety. Still others move for the purpose of sale new cars brought into the state otherwise than upon their own wheels, and second hand cars originally purchased and used thereafter within the state. All these may transport their cars throughout all portions of the state without restraint or fee requirement,—just so long as they do not pass from the southern part of the state to the northern part, or *vice-versa.*

(3) The Rule as to Inclusiveness of a Classification.

We are familiar with the rule announced in the "fire-arms case" of *Patsone v. Pennsylvania*, 232 U. S. 138, 58 L. Ed. 539, urged by appellants as justifying the singling out for purposes of fee exaction of for-sale cars brought in from outside the state in fleet movement. We do not challenge the right to properly narrow down a classification, or insist that it possess "abstract symmetry," or that it need reach and control every evil or abuse. But we do contend that it must be free from discrimination and that its purpose and its operation be *bona fide* and have a proper relation to the subject treated.

The efforts of appellants to emphasize the objectional features of moving what are ordinary pleasure cars in fleet formation for purposes of sale totally ignore other numerous and notorious hazards which are continuously present. Any attempt to identify the fleet movements of cars for sale as the only or even the principal movements on the highways presenting difficulties is impeached by the results of common knowledge and the most casual observation, which furnish glaring instances of other far more troublesome uses of the highways. Instance the huge, lumbering, transcontinental moving-vans and the gigantic trucks and oil tankers,—all hauling trailers in tow; the great, rambling house cars and other cars hauling trailers with living quarters; the combination truck-and-trailer carrying from three to six automobiles on deck; all of which dangerously obscure the vision of other motorists and imperil traffic on literally every mile of

the highway, presenting hazards of grave danger at every curve and upon every grade,—besides contributing so substantially to the wear and tear of the highways. Other commonly known and constantly observed instances include automotive equipment of the most dangerous character,—that of the irresponsible, penniless, so-called "tin-can tourists" (commonly so designated because their equipment is notoriously make-shift and little more than tin held together with bailing wire), and that of poor refugees, sadly undernourished and distressed both physically and mentally, coming from impoverished or disaster-stricken areas elsewhere, seeking with grim determination to reach California by means of any conveyance possible to be kept together on four wheels,—with total disregard and in fact utter lack of means to have regard for anything approaching adequate brakes, necessary lights, or tires or mechanism safe for travel. These serious menaces to safety and to life itself are totally ignored in the diligent effort of appellants to emphasize the hazards and the evil of caravaning those particular cars which happen to be for sale.

We concede that, under the doctrine announced in the *Patsone* case, *supra*, the existence of such common instances does not necessarily invalidate the classification. But, as stated in the decision of the three-judge District Court in which the 1935 California Caravan Law was held to be discriminatory, such instances are

> "eloquent of the fact that the defining elements of the Caravan Act classification are not elements of the wrong aimed at and do not gather together the common malefactors but do arbitrarily and unreasonably embrace innocent actors."
>
> *Morf v. Ingels* (1937), 14 Fed. Supp. 922.

We believe the instances serve to indicate that something more than mere safety of travel was the concern of those striving to uphold the statute,—and that this renders the discrimination in exempting other for-sale cars moving within the state the more obvious.

(4) The Power to (1) Regulate, and (2) Impose Charges.

It is, of course, recognized that this Court has repeatedly held that the states possess broad powers both (1) to regulate traffic and (2) to impose charges upon those who use their highways. These powers have been reviewed by this Court in numerous decisions, of which the two following are typical. They were reviewed at considerable length, particularly the power to regulate, in *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177. They were also clearly presented in *Interstate Transit v. Lindsey*, 283 U. S. 183, which had to do with the power to impose charges. We, of course, recognize the law to be as announced in those decisions.

In the *Lindsey* case, involving a statute imposing a privilege tax graduated according to carrying capacity, it was pointed out that while the state is free to levy occupation taxes and tax the privilege of doing an intrastate business without regard to whether the charge imposed represents merely a fair compensation for the use of their highways, the power to tax or levy fees when interstate commerce is affected is restricted to a charge predicated upon the use made of the highways. In other words, the charge made is "valid only if compensatory." *Interstate Transit v. Lindsey*, *supra*, at 190. It was held that while a state may not lay a tax on the privilege of engaging in interstate commerce, it may

impose even upon motor vehicles engaged exclusively in such commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and regulating the traffic thereon (at 185). As such a charge is a direct burden on interstate commerce it cannot be sustained unless it is levied only as compensation for the use of the highways or to defray the expense of regulating motor traffic. But it was clearly pointed out that the charge will not be sustained where it is found that it bears no reasonable relation to the privilege of using the highways, or that it is *discriminatory* (at 186).

In the *Barnwell Bros.* case, a "regulation" case as distinguished from the *Lindsey* "fee case," in which were involved certain limitations upon the width and weight of motor trucks, the power of the state to regulate is extensively reviewed, and the reluctance of this Court to substitute its judgment for that of the legislative body in determining proper regulatory measures is emphasized. As therein stated this Court has in some instances sustained the exercise of this power to regulate even where it has burdened or impeded interstate commerce,—but only where there was *no discrimination*. It is recited that weight limitations lower than those imposed in that case had been upheld, but they were weight limitations *applied alike* to motor traffic moving interstate and intrastate; that restrictions favoring passenger traffic of the carriage of interstate merchandise by truck had been similarly sustained; and that the exaction of reasonable fees for the use of the highways had been applied in numerous instances, but always where *applicable to all alike*. The Court points out that in each case the regulation imposed caused some burden on interstate com-

merce, but held that so long as the state action *did not discriminate* it was valid, as an inseparable incident of the authority.

The decision is notably forceful in its statement with regard to *discrimination,* emphasizing throughout that discrimination "whatever its form or method" is prohibited, that discrimination will invalidate any attempt at regulation. May we emphasize the following pertinent quotation:

> "The commerce clause, by its own force, *prohibits discrimination against interstate commerce, whatever its form or method,* and the decisions of this Court have recognized that there is scope for its like operation when *state legislation nominally of local concern is in point of fact aimed at interstate commerce,* or by its necessary operation is a means of gaining a local benefit by 'throwing the attendant burdens on those without the state.'" (Italics supplied.)
>
> *South Carolina State H. Dept. v. Barnwell Bros., supra,* at 185, 186.

In applying this definition of the effect of the commerce clause to the authority of the state, discrimination is again emphatically prohibited:

> "The nature of the authority of the state over its own highways has often been pointed out by this Court. *It may not, under the guise of regulation, discriminate against interstate commerce.* But 'In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use *applicable alike to vehicles moving in*

interstate commerce and those of its own citizens.' Morris v. Duby, 274 U. S. 135, 143, 71 L. ed. 966, 971, 47 S. Ct. 548. This formulation has been repeatedly affirmed, Clark v. Poor, 274 U. S. 554, 557, 71 L. ed. 1199, 1200, 47 S. Ct. 702; Sprout v. South Bend, 277 U. S. 163, 169, 72 L. ed. 833, 836, 48 S. Ct. 502, 62 A. L. R. 45; Sproles v. Binford, 286 U. S. 374, 389, 390, 76 L. ed. 1167, 1179, 1180, 52 S. Ct. 581; *cf.* Morf v. Bingaman, 298 U. S. 407, 80 L. ed. 1245, 56 S. Ct. 756, and never disapproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. It has upheld weight limitations lower than those presently imposed, *applied alike to motor traffic moving interstate and intrastate.* Morris v. Duby, 274 U. S. 135, 71 L. ed. 966, 47 S. Ct. 548, *supra;* Sproles v. Binford, 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581, *supra.*" (Italics supplied.)

South Carolina State H. Dept. v. Barnwell Bros., supra, at 189.

The decisions in the *Lindsey* case and the *Barnwell Bros.* case demonstrate the limitations definitely recognized and applied by this Court in the exercise by states of their power to (1) make regulations and (2) impose charges. As regards charges, they can be "valid only if compensatory" and they cannot be *discriminatory.* As regards regulations, they must not only be reasonable and have the proper relation to the subject matter, but there can be *no discrimination* against interstate commerce, "whatever its form or method." States may not "under the guise of regulation" violate the commerce clause by discriminating against interstate commerce. *Barnwell* case, *supra,* at 185, 189.

(5) The Changes Made in the Former Law Do Not Remove the Discrimination.

The Caravan Law enacted in 1937 repealed the statute of 1935 and set up a new act which, as pointed out in appellants' brief (pp. 3-5), made two changes; first, it split the fifteen dollar ($15.00) fee in half, allocating one-half to the support of the Department of Motor Vehicles and the other half to the State Highway Fund, and second, it attempted to overcome the charge of discrimination against interstate commerce by setting up two zones within the state and charging a like fee for any movements between such two zones,—no fee being required for any movements within either one of the said zones.

It is our contention that this attempt did not remove the grounds for the charge of discrimination and that it amounts to little more than a subterfuge to cover up the real result. It is obvious that the change injected by the division of the entire state into two so-called zones was made in the endeavor to bring the statute within the case of *Morf v. Bingaman*, 298 U. S. 407. It was sought thereby to be able to contend that the law applied to intrastate as well as interstate traffic. In the *Morf v. Bingaman* case, which had to do with the New Mexico statute, the Court pointed out that

> "the statute *applies alike* to *all* automobiles transported for sale, whether moving intrastate or interstate" (at 410). (Italics supplied.)

The present Caravan Law does not "apply alike to all automobiles transported for sale," but in all cases except where a movement is made from the northern to the southern part of the state, or *vice versa*, no permit is

required. No fee is charged by the statute for *any* movement entirely within the state.

Appellees are engaged in the business of bringing cars purchased elsewhere into the State of California and offering them for sale. Naturally, this business presents competition, and unwelcome competition, to those selling new cars in California as well as to those marketing second-hand cars which have been purchased and used in that state.

The effect upon the appellees of the imposition of this tax or fee is highly damaging, if not destructive to their business. According to the testimony of the appellee Paul Gray, the net profit which is made on each car transported into California for sale is approximately ten dollars ($10.00) [R. 108]. It was stipulated that the rest of the plaintiffs would testify to the same effect [R. 109]. There is no evidence to the contrary.

No fee or charge of this character is required with respect to the transportation of any other motor vehicles in California unless they cross a boundary line which divides the state approximately in two. There are in California several factories manufacturing motor vehicles and numerous plants manufacturing either the entire truck or automobile or portions thereof and assembling the remainder. The numbers of cars moved from these plants to distributors or dealers is referred to in the various affidavits of representatives of the automobile manufacturing corporations [R. 121, 127, *et al*]. These numbers are substantial and greatly exceed the numbers of for-sale cars driven into the state. No restriction is imposed upon the transportation on their own wheels of either new or second-hand cars for sale, unless they cross this boundary line drawn approximately midway

across the state. They are free to transport cars for sale in any manner they wish throughout large areas of California, areas which are much larger than many entire states of the Union.

The trial court was plainly not impressed with the sincerity of the attempt by the creation of two zones to make it appear that movement of for-sale cars entirely within the state receive the same treatment as those brought in from without the state. It found that the "interzone moving is negligible" [R. 38] and that "the attempt is plainly ineffectual" [R. 41]. Appellants' own evidence robbed the zoning attempt of any effectiveness. In the testimony of their witness Personius, he stated that in the territory with which he was familiar "the fleet movements were entirely interstate" [R. 82]. In the affidavit of Ray Ingels, the Director of the Department of Motor Vehicles, he refers to any fleet interzone movements as "occasional movements" [R. 113]. In Todd Bates' affidavit he qualifies his statement as to any such movements by limiting them to "certain seasons of the year" and "under certain circumstances" [R. 156].

Certainly this is a long way from making the provision apply alike to all persons moving automobiles for sale throughout the state, and results in penalizing the interstate commerce engaged in by appellees in favor of others who may move their for-sale cars without restriction.

We cannot escape the conviction that the Caravan Law does precisely what the *Barnwell Bros.* case held to constitute a violation of the commerce clause, that it is "state legislation nominally of local concern in point of fact aimed at interstate commerce," and that it "by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without

the state." *South Carolina State H. Dept. v. Barnwell Bros., supra,* at 186.

Whether fleet movements entirely within the State of California have been engaged in extensively in the past or not, in order to make the statute constitutional it must apply like regulation to any such traffic as may exist or may develop. As stated in the *Barnwell Bros.* case, "it must be applicable alike to vehicles moving in interstate commerce and those of its own citizens" (at 189). It cannot say that all present or future automobiles moved for sale within Southern California or Northern California are at entire liberty to proceed as they please without the payment of any fee, and at the same time say that one brought across the state line from Nevada or Arizona shall be charged fifteen dollars ($15.00). "It may not, under the guise of regulation, discriminate against interstate commerce." *South Carolina State H. Dept. v. Barnwell Bros., supra,* at 189.

The decision of the three-judge District Court agreed with appellee's contention that the re-enacted statute was still discriminatory even after the change made in 1937 and granted a permanent injunction against its enforcement. That Court held the attempt of the legislature to overcome the charge of discrimination against the former Caravan Law (California Statutes 1935, p. 1453) by providing for two zones within the state to be "*plainly ineffectual*" in its opinion. It stated that the creation of two zones in the state "*is highly suggestive of an effort to create a distinction where none in fact exists.*" It held that the provision exacting fees from for-sale cars driven in from outside the state is "*nothing but discriminatory*" [R. 40, 41]. Appellees submit that such discrimination cannot be sanctioned under the constitutional safeguards.

(6) The Statute Violates the Commerce Clause Because it Prescribes Not the "Manner of Use" But the "Persons by Whom the Highways May be Used."

Upon careful analysis the Caravan Law is clearly invalid when subjected to the test under which this Court held a statute of the State of Washington unconstitutional as offending the commerce clause. *Buck v. Kuykendall*, 267 U. S. 307. There the statute prohibited common carriers for hire from using the highways by auto vehicles between fixed termini and over regular routes without having first obtained from the director of public works a certificate that public convenience and necessity required such operation. Upon applying for such a certificate and alleging willingness to comply with all applicable regulations the plaintiff was refused, the ground of refusal being that under the laws of the state a certificate could not be granted for any territory already being adequately served by the holder of a certificate. In defense of the statute the usual arguments were made: *viz.*, that the highways belong to the state, that it may make provisions appropriate for securing the *safety* and convenience of the public in the use of them, that with the increase in number and size of the vehicles used on the highways both *the danger and the wear and tear* grow, that to exclude unnecessary vehicles promotes both safety and economy and that state regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress dealing specifically with the subject.

This Court held the argument unsound, emphasizing that the statute determined "not the manner of use but the persons by whom the highways may be used" (at

315). We submit that the Caravan Law does the same thing. It in effect defines the term "caravaning" to include *only* those vehicles transported for the purpose of selling or offering for sale. [Appendix A, p. 75.] It denies the use of the highways for such purpose to all persons unless a special permit is obtained, for which a fee is charged and collected "as a condition precedent." [Appendix A, p. 76.] It does not determine or prescribe the *manner of the use* of the highways. It merely *limits their use to certain persons.* It restricts only those who are to sell or offer for sale their cars.

Under the Caravan Law any number of automobiles may be transported and brought into California, and without any limitation or restriction—so far as its provisions are concerned—just so long as the purpose in transporting them is not that of selling or offering for sale. They may be taken there in any number, and in fleet or any other manner or formation, either for purposes of demonstration, or for purposes of hiring, or for the purpose of being used in any conceivable undertaking involving either pleasure or business,—and be entirely exempt from the payment of this fee or tax, just so long as they are not to be sold or offered for sale within ninety days.

The effect of the statute is thus to prohibit the use of the highway to some persons, while permitting it to others using it for the same purpose and in the same manner, *viz.*, for the purpose of transporting automobiles.

The legal result thus brought about is obvious—and startling as well—when one reflects that there is nothing whatever to prevent fleet movements, or movements of any other kind or formation, in any one of numerous instances where the purpose served may in-

volve far greater hazards to safety than that so diligently sought to be restricted here. The caravan becomes a menacing cavalcade,—or even a juggernaut. A few definite and pertinent instances will illustrate this clearly. Such transportation of cars may include great group-travel movements of delegates to attend conventions, or the journeying together of large numbers to political gatherings, or the making of organized pilgrimages by religious or fraternal orders, or mass migrations of workers seeking employment or of those banded together and proceeding to a destination for purposes of colonization. Any one of the foregoing movements may very readily reach vastly greater proportions than a movement of ordinary automobiles which, it so happens, are to be sold or offered for sale at their destination,—and be much more highly integrated, cohesive, unwieldy, unruly and menacing to other travel. And yet the term "caravaning," as defined in the statute, does not restrict such movements in the slightest manner, or require any special permit or the collection of any fee therefor.

Viewed in the light of these considerations it is plain that the statute unconstitutionally burdens interstate commerce. The long established principle which is here violated is too well known to require voluminous citation, but the decision of this Court in *Buck v. Kuykendall, supra*, holding unconstitutional the statute of the State of Washington which had a like effect is so apt that it is here quoted:

> "It may be assumed that section 4 of the state statute is consistent with the 14th Amendment; and also, that appropriate state regulations, adopted primarily to promote safety upon the highways and conservation in their use, are not obnoxious to the

commerce clause, where the indirect burden imposed upon interstate commerce is not unreasonable. (Citing a case.) *The provision here is of a different character.* Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the *prohibition of competition.* It determines not the manner of use, but the persons by whom the highways may be used. *It prohibits such use to some persons while permitting it to others for the same purpose* and in the same manner. * * * Thus the provision of the Washington statute is *a regulation, not of the use of its own highways, but of interstate commerce.* * * * Such state action is forbidden by the commerce clause." (Italics supplied.)

Buck v. Kuykendall, supra, 315, 316.

Precisely so in this case. Identically the same use of the highways, "for the same purpose and in the same manner," *i. e.*, the operation of cars in fleet movements, is permitted to some, but is denied to others,—to those particular persons, and those only, who have to move cars in the conduct of their business to get them to a destination for the purpose of selling them. The statute is directed at a particular business. It is "a regulation, not of the use of the highways, but of interstate commerce." As found in the *Buck v. Kuykendall* case, the primary purpose is *"the prohibition of competition".*

It is not enough for appellants to attempt to waive this vital defect aside by saying that classifications need not be all-inclusive or reach every evil or abuse that may arise. Here, the attempt to determine "not the manner of use, but the persons by whom the highways may be used" is too clearly apparent. It falls directly within the rule in the *Buck v. Kuykendall* case.

(7) THE CLASSIFICATION DENIES EQUAL PROTECTION, BEING AN ARBITRARY AND DISCRIMINATORY ATTEMPT WHERE NO REAL DISTINCTION EXISTS.

It is well known that a state has a broad discretion as to classification in the exercise of its power of regulation. But, as has been repeatedly announced, there is a limitation upon this exercise. It cannot be so arbitrarily indulged as to result in discrimination. This rule was invoked in no uncertain manner in *Smith v. Cahoon*, 283 U. S. 553. We believe it applies with equal force here, and that so tested the statute must fall. In that case this Court held:

> "But the constitutional guarantee of equal protection of the laws is interposed against *discriminations that are entirely arbitrary*. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action. In the present instance the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety." (Italics supplied.)
>
> *Smith v. Cahoon, supra*, at 566, 567.

There the Florida statute provided for certain requirements being met by "auto transportation companies," among such requirements being the furnishing of a bond for the protection of the public in the event of injury to persons or damage to property. In defining the term "auto transportation company" an exception was made of those engaged exclusively in the transportation, among other things, of agricultural, horticultural, dairy or other

farm products. In holding that the statute violated the guarantee of equal protection of the laws the decision stated:

> "But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee or groceries in general, or other useful commodities."
>
> *Smith v. Cahoon, supra,* (at 567).

The Court held that so far as the statute was designed to safeguard the public with respect to the use of the highways the discrimination made was

> "wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made'" (at 567).

So here likewise there is no valid ground for drawing a distinction as to a pleasure car, or any motor vehicle, merely because it is transported for purposes of sale, such as is necessary to uphold the attempted classification as against the charge of denial of equal protection of the laws. Even where the cars are brought in in fleet movements or in caravans there can be no possible distinguishing factor inherent in such cars themselves or in the movements of such cars, so far as the element of safety is concerned, predicated upon the mere fact that they are for sale or are to be offered for sale. It is just as useful a purpose and just as safe to transport a car which is to be offered for sale at its destination as it is to transport the identical car with the object of putting it to some other use at its destination. De-

fendants' own witness Personius admitted on cross-examination that "the mere fact that the pleasure vehicle may be for sale does not increase the hazard on the highway." [R. 92.] The transportation of a fleet of pleasure cars to be sold upon reaching the point where they come to rest cannot conceivably have any greater inherent or identifying *relation to safety* of traffic on the highway than the transportation of a fleet of taxi-cabs (by no means not a rare practice) to be put to the use of transporting passengers upon reaching the destination. Just as in the *Smith v. Cahoon* case there was found to be no justification for making a distinction between milk and butter on the one hand and bread and sugar or other groceries on the other, so in this case equal protection of the laws is denied when the attempt is made to draw a distinction between an automobile for sale and one for hire, or for pleasure,—or for any other lawful use. It can be nothing else but an arbitrary and invalid attempt at classification.

There certainly is no inherent quality in an automobile which is to be sold which makes it different or distinct from one which is not. Where is there any natural, intrinsic, real or substantial distinction such as is required as a basis for valid classification?

Southern Ry. v. Greene, 216 U. S. 400, at 417;
Darnell & Son v. Memphis, 208 U. S. 113, at 120.

They both look the same, run the same, and possess the same parts and mechanism, with a probable advantage —so far as safety is concerned—in favor of the one which is to be offered for sale. Yet the Caravan Law limits its provisions to those moved for the purposes of sale or offering for sale. What its purpose should be, if

safety be the consideration or object, is the regulation of the *operation* of motor vehicles in fleet or convoy formation, and what the statute should do and needs must do if it is to achieve that purpose is to embrace all such *operations* within its prohibition, rather than attempt to designate as the object of its regulation something which immediately precipitates discrimination, something having no relation *per se* to the purpose of safety, *viz.*, the for-sale car. As a matter of fact, all cars driven on the highways are offered for sale or sold at one time or another. But if the consideration or object be not so much safety as an ulterior and primary one of handicaping, penalizing or destroying a particular business enterprise—lawful though it may be—then no more apparent or thinly-veiled method could be adopted than that of singling out and arbitrarily designating one specific person—the person who is to offer his car for sale, and requiring him to purchase a permit. The Caravan Law addresses itself solely to the person. [Appendix A, p. 76.] He may use the highway as freely as anyone else—just so long as he does not offer the car he is moving for sale. Is not this Court's pronouncement in *Buck v. Kuykendall, supra*, highly pertinent and conclusive?

> "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but *the prohibition of competition.* It determines not the manner of use but *the persons by whom the highways may be used.*" (Italics supplied.)
>
> *Buck v. Kuykendall, supra*, at 316.

Here the statute has not one word to say about the manner of use of the highways. It simply prescribes by whom it cannot be used without the payment of a fee. It singles out one person—and chooses to make that one

person the man who is to offer his car for sale when he reaches his destination. And in spite of anything that can be said, that person *per se*, and his car likewise, is just as much entitled to make use of the highway as any other person or car, and under the same conditions and with *equal protection* and rights under the law. The same situation exists here as was frowned upon in the *Smith v. Cahoon* case.

There can be no justification for making a distinction between him and his car, as "bread and sugar," on the one hand and another person and his car, as "milk and butter," on the other; when as to individuals and cars there exists no real difference whatsoever. The attempted classification "is not based upon anything having relation to the purpose for which it is made." (*Smith v. Cahoon, supra*, at 567.)

It is only when the manner of use and practices that may be followed come in that any basis for classification whatever can be claimed. The statute imposes no regulation upon these, makes not even the slightest reference to them. It falls definitely within the rule laid down in the *Buck v. Kuykendall* case. Hence it is fatally defective when thus tested.

And even though it be claimed that the intent of the statute as interpreted by those seeking to defend it is to regulate traffic, any attempted classification is plainly invalid as arbitrary and discriminatory under the *Smith v. Cahoon* case. We are perfectly aware of the attitude often expressed, that no classification need be all-inclusive, that it need not approximate perfection. But this Court and the state tribunals as well have definitely and positively refused to sustain such an attenuated attempt to arbitrarily single out and penalize a particular business enterprise.

(8) THE ATTEMPTED DISTINCTION BETWEEN INTERSTATE AND INTRAZONE MOVEMENTS IS DISCRIMINATORY.

Let us now compare the number and the method of transportation of for-sale cars driven interstate with those driven intrazone.

The number of cars brought in to California for sale on their own wheels was found by the District Court to be approximately 15,000 annually. It was stipulated that from January 1, 1935, to November 29, 1935, (approximately eleven months) there were 14,000 new and used passenger automobiles caravaned into California for the purpose of sale and that the number so caravaned "since that time per year is approximately in the same proportion." [R. 81.] This figures slightly over 15,000. This number is subjected to the $15.00 fee or tax by the Caravan Law. (There is no evidence as to the number of such cars, if any, which move from one zone to the other within the state, *or* that any fee is exacted or effort made to enforce the statute with relation thereto.)

The total number of cars transported for sale entirely within the two zones is not available from the evidence. These are specifically exempted from the operation of the statute. [Appendix A, p. 78.] The District Court, in its opinion, [R. 40] stated that "at least five times that number," *i. e.,* five times the 15,000 brought in from outside the state, were so exempted. Let us see if that proportion is excessive. The auditor for one of the firms delivering for-sale cars for the Chrysler factory, testified that they drove "approximately 1500 to 1700 per month"—cars for sale on their own wheels in Zone 1. (about 20,000 per year), and that they trucked "a little less than we drive. Possibly 1500 or 1600." [R. 77,

78.] The district manager of Pacific Motor Trucking Company, which engages its services to the Southern California Division of the General Motors Corporation, stated in his affidavit [R. 119-121] that their drive-away deliveries in Southern California (Zone 1) for the first six months' period of 1937 was 10,595 (or about 21,000 annually). These refer to for-sale cars transported from only two plants manufacturing new cars, and only within Zone 1. It was stipulated that 250 new Studebaker automobiles per month (3,000 annually) use the high ways in Zone 1 for transportation for purpose of sale [R. 80] and that 100 new International trucks are transported monthly in Zone 1 on their own power and in addition 50 per month from San Pedro to Los Angeles, a total of 150 per month [R. 81]. The witness Miske testified that he transported for sale about 250 or 300 new trucks per month (over 3,000 annually) [R. 79]. No figures are given as to used cars moved for sale, nor as to movements in Zone 2. Some additional figures as to movements of for-sale cars in Zone 1 are given in the affidavits of Holm [R. 121] and Cron [R. 127]. Although other affidavits from representatives of De Soto, Plymouth, Chevrolet, Hudson, Dodge, Chrysler, Cadillac and La Salle distributors of automobiles and trucks are included [R. 127, 131, 133, 135, 136, 147, 149], relating to the movements of their cars, no amounts are given. It is clearly evident that the total of all new automobiles and trucks manufactured in California and those assembled there, together with used cars and trucks, which are transported on the highways for sale within both Zone 1 and Zone 2 reaches a very substantial figure, and that the District Court's statement that they amount to "at least five times" the number of cars driven in for sale from outside the state is a conservative one. Almost

three times as many *new* cars are moved in this manner by only two concerns, and within one of the zones only. [Testimony of Murchison, R. 77; and affidavit of Shaw, R. 119.]

Thus at least five times as great a movement is expressly exempted by the provisions of section 8 of the statute. [Appendix A, p. 78.] Let us inquire as to what kind of a movement the intrazone movement is. To begin with, it is conceded that these cars, like the others, are moved for the purpose of sale, or offering for sale. They are the for-sale cars to which those driven in from outside the state present competition. They make use of the privilege of the highways just as the others do. Appellants have urged that they are moved largely in the "metropolitan areas." If this be so it but emphasizes the substantial contributing factor they present to the congestion of crowded districts.

As a matter of fact, the evidence reveals movements of substantial distances. By appellants' own analysis (App. Br. p. 34), presumably that of a typical situation and one tabulated from an affidavit filed in their behalf [R. 121, *et seq.*], in a movement of 130 cars during a two months' period 22.3 per cent of the cars were driven over 100 miles within Zone 1 and 11.2 per cent over 150 miles. This was after deducting 13 for-sale cars which were driven from Long Beach, California, to Arizona and Nevada—those cars, because for-sale cars driven outside the state, being subject to the payment of the tax. (They were being delivered in the same way and for the same purpose as those within a Zone, but when they crossed the state line a tax was required. Is this not another example of the violation of the rule announced in the *Barnwell Bros. case*—that regulations must be

"applicable alike to vehicles moving in interstate commerce and those of its own citizens" and that the state "may not, under the guise of regulation, discriminate against interstate commerce." *South Carolina State H. Dept. v. Barnwell Bros., supra*, at 189.)

In several of the affidavits [R. 132, 134, 136, 138] the stereotyped statement is made that the "deliveries are in most cases effected within a radius of 75 to 100 miles." If the movements be confined to "metropolitan areas" then the resultant objectionable effect upon congestion is plain. If they be transported for considerable distances then it becomes more and more difficult to distinguish between them and the imported cars complained about. The intrazone deliveries of for-sale cars are made in fleet movements also, but are limited to three or four cars [R. 77, 134, 137, 155]. With the exception that the deliveries of local cars are made with regularly employed drivers rather than those only casually employed, is it not almost entirely a question of degree as to which movement may be the more objectionable—with the factor of the movement of local cars in far greater numbers weighing in favor of the imported cars?

In addition to this substantial contribution to congestion on the part of the local for-sale car deliveries by reason of their far greater numbers, the evidence reveals that in the case of those delivered by truck (not included in the above figures), as distinguished from those driven on their own wheels, as many as six automobiles are loaded on a truck unit sixty feet in length and delivered in that manner—three on the front portion, two on the trailer and one on the truck over the driver's cab [R. 77]. The witness Murchison testified that the firm for which he is auditor trucks "1500 or 1600" cars on an average

per month (about 19,000 per year) in Zone 1 alone, delivering the output of but one factory [R. 77, 78]. None of this evidence was refuted. It can scarcely be questioned that such a practice presents traffic menaces of a very real character.

Again we say that while the failure of the statute to embrace and regulate *all* objectionable practices of delivering for-sale cars may not necessarily and of itself invalidate it, the above facts are highly significant; and, related to the discrimination which results under the statute, indicate a willingness or desire to ignore hazards to safety in the movements of local for-sale cars, and recognize and regulate others which, it is claimed, do not exist in the movements of the favored class,—thus emphasizing the discrimination in both the *purpose* and *effect* of the statute. As a matter of fact, the attempt to claim the distinction is defeated by acknowledged conditions. The District Court held that "Altogether, it is difficult to distinguish between the two systems of transportation" and that the statute is "nothing but discriminatory." [R. 40, 41.]

May we here comment generally upon the volume of appellants' evidence in the record as it exists with the inclusion of the affidavits? We realize that the record is replete with affidavits filed after the trial in behalf of the appellants. These affidavits, sixteen in number and covering some fifty-six pages, include those of public officials, representatives of local factories and of manufac-

turers of motor vehicles, officers of local motor car dealers' associations, and others,—practically all being made by those having a highly personal interest in the outcome. It was stipulated that these affidavits might be regarded as evidence. Studied, prepared statements of this character are naturally of the most pronounced self-serving type and effective challenge of them is extremely difficult. There is no opportunity afforded for cross-examination of the affiants as witnesses or of testing their credibility in numerous ways, and the practice is in many instances most unsatisfactory. Yet appellees are not awed or dismayed by either the volume or the vehemence of the statements contained in these affidavits. Nor was the three-judge trial court. The revealing of a manifest discrimination of a substantial and arbitrary character was not escaped by the effort to justify the statute. Without impugning the personal veracity of any affiant, let it be said that the element of credibility, when the content of the affidavits was weighed in relation to the provisions and effect of the statute, very obviously became an important factor in the Court's mind. Not so much the bare statements, but more pertinently the intent and the effect stood out. The discrimination and the denial of equal protection became the more apparent. The District Court held that the creation by the statute of the two zones "is highly suggestive of an effort to create a distinction where none in fact exists," and that the attempt to absolve the statute from the charge of discrimination and to bring it within the *Bingaman* case was "plainly ineffectual." [R. 40, 41.]

(9) THE DISCRIMINATION BETWEEN APPELLEES' CARS DRIVEN IN SINGLY AND FOR-SALE CARS DRIVEN SINGLY WHOLLY WITHIN THE STATE INVALIDATES THE STATUTE.

(a) *The Stipulation as to Single Car Movements.*

The effort is made by appellants in their brief (pp. 6, 44, 45), to foreclose any consideration of the invalidity of the classification by reason of the fact that the statute, by including cars moved *singly* and not in caravan or fleet formation, unlawfully discriminates against those driven in from outside the state, and in favor of local for-sale cars moved in precisely the same manner. In contending that this character of discrimination cannot be urged in this case they assert that the evidence cannot be construed to support any claim that appellees so transport any of their cars. Their position is unsupportable and the contention is manifestly unfair, as will be pointed out.

It is conceded that, under the decision in *Morf v. Bingaman, supra*, a party, in order to be in a position to claim discrimination, must fall within the class discriminated against (at 413). We do not contend otherwise.

It is true that appellees' witness Asher did testify only as to caravan movements. [R. 105, 106.] The purpose of his testimony was clearly only to describe the manner of making such movements,—as the testimony of appellees' witness Gray was confined almost entirely to one purpose—that of explaining, from a business point of view, the practice of bringing in outside cars for purposes of sale in California, the small profits to be made and the damaging effect on the business of the 1937 statute. [R. 108.]

But at the very outset of the case this question was settled by a definite stipulation. [R. 72.] It was stipulated that 80 per cent of the cars which come into California for the purpose of sale come in convoys of two or more cars; *i. e.*, in caravan or fleet movement; and that twenty per cent come in as *single unit* cars—not in combination or in company with any others. [R. 72.] This stipulation applied to *all* cars brought into California for sale, including those of appellees *as well as all others.* The purpose of the stipulation was to have a *bona fide* agreement as to the facts so that an adjudication could be obtained as to the existence of discrimination, *discrimination of three different kinds*—first, that between those cars driven into the state singly for the purpose of sale and those driven in from outside the state singly for purposes other than sale; second, that between those driven in singly for the purpose of sale and those driven solely within the state for like purpose; and third, discrimination resulting from the attempt to create a distinction between the entire interstate movement of for- 'e cars (including those in fleet formation) and the ...ement of all for-sale cars taking place wholly within the state. (The first named of these three kinds of discrimination is shown under Point II (2), post p. 69.)

There was no other purpose for this stipulation than the creation of these issues and the bringing about of their determination in this action. Up to the time of the filing of appellants' brief, not the slightest intimation of treating it otherwise had been given. For appellants to now assert that the stipulation constitutes only "general statistics" of the caravan traffic (Brief p. 44), certainly must be regarded as a futile effort to evade the issue, and we submit that it subjects them to criticism for

improperly attempting to foreclose appellees from obtaining the adjudication sought. The stipulation could have no other effect than to describe and identify by proportion of volume the character of movements of for-sale cars from without the state for the purpose of ascertaining whether discrimination is present; otherwise it would be idle, meaningless and have no bearing whatsoever upon the case or its issues.

As the stipulation covered *all* for-sale cars driven into California, it must of necessity include those of appellees, and the percentages agreed upon apply to the movements of appellees' cars the same as to all other such cars. We submit that it cannot be regarded otherwise.

In appellees' brief the attempt is also made to evade the effect of this stipulation by stating that it was withdrawn (Brief p. 45). Let us examine the record as regards this situation. Counsel for plaintiffs offered a definite stipulation to which counsel for defendants replied:

> "Mr. Palstine: We will stipulate that the witnesses for the plaintiffs, if called, would so testify." [R. 72.]

Following this there were questions asked by members of the Court seeking to definitely understand the application of the percentages, and these questions were answered by counsel for both parties. [R. 72, 73.] After this discussion counsel for the plaintiffs stated that as there seemed to be a question on the stipulation he was willing to withdraw it and put a witness on the stand. [R. 74.]

The Court clearly ignored the suggestion and Judge Cosgrave then asked a further question, stating his understanding, and this was agreed to by Mr. Palstine. The following definite question was then asked by Judge Cosgrave:

> "Judge Cosgrave: Twenty per cent comes in singly, and each car in charge of an individual driver, is that right?
>
> Mr. Palstine: Yes." [R. 74.]

We submit that there can be no possible question as to the understanding of the Court relative to the number of cars driven in singly. Following this there was other discussion between the Court and counsel, ending with the following statement of Judge Cosgrave:

> "Judge Cosgrave: All right." [R. 75.]

There was no further expression from the Court, with nothing but silent acquiescence on the part of the two other judges as to the withdrawing of the stipulation, there was no dissent expressed by Mr. Palstine as to its content, and it is clearly obvious that the Court at that stage understood its effect. While the witness Manford was then placed upon the stand his testimony related only to his experience at one of the stations and clearly did not affect or supersede the all-inclusive, definite stipulation,—nor was it so regarded by the Court.

The stipulation plainly established the fact that twenty per cent of all for-sale cars coming into California on their own wheels are driven in singly. Its effect cannot be other than that of a definite understanding and agreement that the same percentage applies to the for-sale cars brought into California by the plaintiffs in the action.

(b) *The Application of the Statute to Single Car Movements Renders It Discriminatory.*

What has been said before in this brief relative to discrimination against all motor vehicles driven into California for the purpose of sale applies with special emphasis and increased force in the case of single car movements. Here the automobile taxed is just the same as that of any other motorist on the highway. It is proceeding alone, not in company or in combination with any other cars, with the sole difference that, at its destination, it will be sold or offered for sale. Contrasted with this, those cars already in California which are for sale may be driven at will and without fee or permit throughout any area in either Northern or Southern California.

The burdening of interstate commerce and the denial of equal protection here become greatly aggravated. Just as in the *Smith v. Cahoon* case this Court condemned as "wholly arbitrary" the attempted exemption from the classification of those engaged in the distribution of farm products, so here the attempted exemption of identically the same kind of cars driven anywhere within the area of one-half the State of California can be nothing but a violation of the guaranteed constitutional right. Again we emphasize that there can be no justification for making a distinction against the car originating without the state, as "bread and sugar," and in favor of the car already in California, as "milk and butter."

The decision of *Buck v. Kuykendall, supra,* likewise applies with exaggerated force to the single car movement. The language looms up with controlling authority.

> "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition" (at 316).

Just as in the *Buck* case, the Caravan Law when considered and applied with respect to single for-sale car movements "determines not the manner of use, but the persons by whom the highways may be used" (at 316). It denies the use to those driving a for-sale car into California from without the state unless a fee is paid.

Appellants state (Brief pp. 53-56) that even if they admit that by reason of the stipulation twenty per cent of the cars of appellees are driven into California singly, still the classification is valid under principles announced in *Purity Extract & Tonic Company v. Lynch*, 226 U. S. 192, and *Euclid v. Ambler Realty Company*, 272 U. S. 365. We take it that by this they mean that all of the transactions covered need not be objectionable but that innocent ones may be included in a regulation if it is necessary to accomplish the purpose and obtain the object aimed at. We are familiar with the general rule which has recognized and condoned, as necessary and incidental, violations of rights in isolated cases. However, this rule does not extend so far as to sanction the exercise of regulatory powers where there is a *direct* and *substantial* infraction of guaranteed rights, or where the provision is palpably arbitrary and does not bear the necessary relation to a proper purpose. The point here is that if the movement of cars in a certain manner or in certain formations

is objectionable and merits and requires regulation, this can be accomplished by proper definition and application of the regulation. If this be the evil aimed at it is totally unnecessary to include in a classification to accomplish the purpose cars driven singly and in a manner differing not at all from movements of other cars which are exempted. To arbitrarily attempt to adopt such a classification as that of "cars for-sale," without characterizing the method or manner by which these cars can be transported can, we submit, be nothing less than discriminatory and violative of the rights guaranteed by the constitution.

(10) APPELLANTS' ARGUMENT DEFENDING THE DESCRIPTION OF FOR-SALE CARS AS A CLASS AS AGAINST A DESCRIPTION OF THE MOVEMENT OF CARS FOR CLASSIFICATION PURPOSES IS UNSOUND.

Appellants urge the argument that the entire volume of traffic charged a fee is properly included because the distinguishing and common attribute of this traffic is the caravan or fleet movement of "a large proportion" of the vehicles. (App. Br. p. 46 *et seq.*)

There are several answers to this line of argument. First, this Court has declined to sanction attempts to apply a general designation of a broad class when unreasonable discrimination exists or results. In the case of *Smith v. Cahoon, supra*, the attempt was made to include all auto transportation companies as a class—and at the same time exempt those transporting farm products. Here the statute attempts to include all for-sale cars as a class—and at the same time exempt those driven from local manufacturing or assembly plants. This Court frowned upon the attempt in the *Cahoon* case. We

contend that the attempt here is subject to the same defect of arbitrary discrimination. To exempt a far greater number of competitive cars, when the trial court held that "Altogether, it is difficult to distinguish between the two systems of transportation" [R. 40], must condemn the statute as one having as its primary purpose "the prohibition of competition." (*Buck v. Kuykendall, supra,* at 316.)

Second, while a general classification is not invalidated by resultant necessary injury to a few, or injustices in isolated or incidental cases, arbitrary discrimination which results in the penalizing of a very substantial number of innocent victims destroys the healing qualities of the rule. Appellants urge the contention that because the class regulated or charged in this instance may include "variations or departures" (*i. e.,* those who do not follow the practice of moving in fleets or caravans), for-sale cars driven singly may still be included, because "an integral part of the practice." (Brief p. 56.) They say that one who moves 80% of his vehicles in caravan cannot complain because a statute which defines the class "in terms of the practice which brought about caravan operations" includes and taxes the 20% he moves singly. The inference is that twenty out of a hundred is so minor a proportion as to be merely incidental. In support of this contention they cite *Purity Extract & Tonic Co. v. Lynch,* 226 U. S. 192, and *Euclid v. Ambler Realty Co.,* 272 U. S. 365. The rule is of course a familiar one that incidental discrepancies in the application of a statute and incidental injustices brought about by its operation need not necessarily invalidate an attempt at classification. But the citation of these decisions demonstrates the inapplicability of the rule here.

Reason and a sense of proper balance must govern in its application. There surely is a line of demarcation, the overstepping of which stamps an effort to ignore manifest injustices of a substantial character as so arbitrary that nothing short of invalid discrimination results. The question of *degree*, the *extent* to which innocent victims are made to suffer must be weighed. *Reasonableness* is indispensible. The curative effect of the rule cannot be invoked to heal unreasonable infringements of rights. This is clearly recognized in the decisions relied upon by appellants. The rule is thus carefully qualified in the *Euclid* case:

> "The inclusion of a *reasonable* margin to insure effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity." *Euclid v. Ambler Realty Co., supra,* at 388. (Italics supplied.)

Here we are not dealing with any mere "reasonable margin" such as was excused in the *Euclid* case. We have a definite and substantial proportion—twenty per cent. or 3,000 sufferers out of 15,000, when we consider the number of cars driven in singly as compared with those in fleet formation. This transcends a mere incidental or necessarily concomitant inclusion. And when we consider the for-sale cars driven in singly as compared with other outside-registry cars driven in singly we find that 99.4 per cent is waived aside and exempted and six-tenths of one per cent is penalized. (See analysis of figures, *post*, p. 70.) Under such circumstances the attempted exactions of the statute cannot qualify under the "necessarily-resultant-injury" rule. Here the overbalanced and inordinate injury inflicted results in destroying the *reasonableness* which must characterize the application of

such a statute. The limits of all excusable indulgence in reasonableness are transgressed. The trespass can result only in discrimination.

In their argument in support of the "description of a class" followed by the statute, appellants emphasize the number of states which have adopted a similar method in attempting to classify for the purpose of regulating and taxing, *i. e.*, the designation of the for-sale car moved on its own wheels. In only two instances, however, have the statutes enumerated been subjected to adjudication. These are clearly distinguishable.

In the case of the New Mexico statute, adjudicated in *Morf v. Bingaman, supra*, there was the clear distinction that the Act "applied alike to all cars moved for sale, whether moving intrastate or interstate" (at 410). There was no attempted exemption of a favored or competitive class. It was not shown that any transportation from factories or assembly plants took place within that state. The question of such discrimination was not presented to the Court.

In the case involving the Idaho statute, the State Supreme Court very clearly recognized that, had any facts existed to support it, the charge of discrimination might have condemned the Act. *Wallace v. Pfost*, 57 Idaho 279, 65 Pac. (2d) 725, 110 A. L. R. 622. There the statute affected only those cars transported from without the state, which is virtually the situation here as regards for-sale cars—the interzone provision being almost purely theoretical, the creation of the two zones being, as the District Court held [R. 40], "highly suggestive of an effort to create a distinction where none in fact exists." In considering the question of discrimination in favor of

for-sale cars moved entirely within the state the Idaho Supreme Court based its decision upon the fact that there was "no showing that automobiles are manufactured in this state" and that while there was

> "evidence of *isolated cases* where new automobiles have been transported from within the state from resident dealers' places of business for the purpose of resale and *possible* transportation of used automobiles from within the state for the purpose of resale. . . .
>
> "A *quantum of business*, such as would defeat the classification as made by the Legislature, does not appear to have been shown." *Wallace v. Pfost, supra*, at p. 728, 65 Pac. (2d). (Italics supplied.)

In the case before us not only is there a showing of numerous manufacturing and assembly plants in California turning out automobiles and trucks in great quantities, but the movement of for-sale cars entirely within the state instead of being susceptible to characterization as "isolated cases" amounts to at least five times as many as are driven in from outside the state. Certainly this constitutes a "quantum of business" which must compel consideration when confronted with the charge of discrimination.

These are the only two decisions to which we have been referred passing upon the statutes of the various states enumerated by appellants as those adopting the classification of for-sale motor vehicles moved on their own wheels "for the purpose of regulating and taxing." (App. Br. pp. 46-47.) In the first, the question of dis-

crimination here presented was not even raised. In the second, the Court decided that the "quantum of business," *i. e.*, that shown by the evidence as a few "isolated cases," was not sufficient to support the charge. Again we repeat that we have found no instance where the rule of reasonableness has been so flagrantly transgressed as is asked by appellants in this case.

Appellants refer also to several states in which they assert that "administrative rulings" have been given which adopt the caravan movement designation. (Brief pp. 47-48.) The inference attempted to be drawn is not clear nor the argument persuasive to us. We have no objection to any convenient designation used or recognized in administrative rulings or elsewhere so long as discrimination and unjust treatment do not result. We have been referred to no adjudications upholding such rulings where discrimination was charged, and we have found none.

It may be that the moving of automobiles over the highways for purpose of sale has been identified in many instances with the practice of moving them in fleet or caravan formation. It may even be assumed, for the purpose of argument, that this gave rise to the practice or method. But when it is revealed that the attempt to apply such an all-inclusive, generic designation as that of "cars moved for sale on their own wheels" results in a classification so ill-chosen and inapplicable to those actually affected that it discriminates arbitrarily and unjustly, such a designation can no longer be sanctioned. Some other

method of describing the motor vehicles sought to be regulated and charged—or, more properly, their *movements*—must then be devised.

It might be regarded by some as reasonable and justifiable, in the attempt to reach and regulate all who go to church, to adopt a designation or classification using the term "hypocrites," resorting to the argument that the practice of going to church is primarily and essentially identified with and engaged in by hypocrites, or was even invented or originated by them,—truly religious persons worshipping unostentatiously in private. But the attempt would fail, as arbitrary discrimination, and those seeking to apply such a designation would be told that they must adopt a more accurate method of describing the class by whom the entire body of church-goers could with reason and fairness be identified. So here, because many who drive their cars for purpose of sale do so in fleet or caravan formation the substantial number who do not so transport their cars or contribute to any trouble sought to be regulated are not to be punished. An unjust discrimination is not to be condoned merely because it may be somewhat more difficult to correctly and adequately describe those sought to be affected.

Appellants' argument as to the difficulties of designating the movement of cars sought to be regulated—if that be the objective—is not persuasive. (App. Br. p. 55.) The suggestion of "insurmountable difficulties of law drafting, and of action and interpretation facing enforcement officials" is not impressive. Our regulatory statutes are

filled with definite and constantly enforced restrictions governing the weight, width and length of motor vehicles, as well as their speed, distance apart and movements with relation to other traffic. It is the most common and effective method known or employed. It defines and regulates *the movement* itself, the thing supposedly aimed at here. It does not discriminate against or penalize a substantial number just because they happen to fall within a broad designation, as for example the twenty per cent who come in singly. In short, it is a valid exercise of the right to regulate the "manner of use," as distinguished from an attempt to dictate as to the "persons by whom the highways can be used" (without the exaction of a fee). The former is entirely proper, if reasonable and free from discrimination; the latter violates the constitutional safeguards. (*Buck v. Kuykendall, supra.*) Its primary purpose becomes "the prohibition of competition,"

But even though it were entirely impossible to draft a provision which would describe the movement complained of (and this would be the last admission to be made by our law-drafters), still this could not excuse or condone a statute invalid because of its unreasonableness and discrimination. Appellants would have this Court weigh the relative merits of legislative methods. This we understand it will not do. We do not ask that this Court substitute its judgment for that of the legislature. All we ask is that it withhold judicial sanction from a statute which has violated the constitutional guaranties as to interstate commerce and equal protection of the laws.

II.

The Exaction of the Fees in the Amounts and in the Manner Attempted Invalidates the Statute.

(1) The Fee Exacted for Traffic Regulation and Enforcement of the Act Is Excessive and Unlawfully Burdens Interstate Commerce and Violates Equal Protection and Due Process.

The District Court held in its opinion that no problems of traffic regulation were presented justifying the expenditure of a tax equaling $112,500 (the computed total of the $7.50 charge for traffic regulation based upon the stipulated number of cars [R. 81], "nor can a charge of $7.50 for the use of the highway be justified with respect to each car transported for sale when it comes from without the state." [R. 42.] It directed attention to the decision of this Court in *Great Northern Railway v. Washington*, 300 U. S. 154, in which it was held that, while a law exhibiting the intent to impose a compensatory fee for regulation and inspection is *prima facie* reasonable,

> "If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law, it cannot stand either under the commerce clause or the Fourteenth Amendment" (at 160).

In the attempt to overcome the defects held to invalidate the 1935 California Caravan Law in *Ingels v. Morf*, *supra*, the statute was revised to split the $15.00 fee in two and apply half to traffic regulation and half to use of the highways.

Appellants contend that the burden was upon the appellees to establish that these fees or charges are exces-

sive for the purposes declared. It is conceded that, as a general statement, reasonable amounts may be charged and demanded for reimbursement for the expense of providing facilities or of enforcing regulations,—the validity of their demand being conditioned upon reasonableness and freedom from discrimination. (*Interstate Transit v. Lindsey, supra*, at 186; *Interstate Busses Corp v. Blodgett*, 276 U. S. 245, at 250-252.)

The contention of appellants as to the burden of proof, we submit, is subject to qualification. There appears to be some variance between the rule as to burden of proof applied in *Great Northern Railway v. Washington, supra*, and the subsequent case of *Bourjois Inc. v. Chapman*, 301 U. S. 183. *Ingels v. Morf, supra*, decided at a date in between the decisions of the two above cases, is the authority relied upon by appellants for its contention. It adjudicated the 1935 Caravan Law which by its definition of caravaning expressly limited its application to transportation of for-sale cars "*from without the state.*" (*Ingels v. Morf, supra*, at 292.) The 1937 statute changed the definition so that the phrase "from without the state" is deleted. (Sec. 1.) [R. 12.] The statute now by its terms operates directly *both* upon interstate and intrastate commerce, section 1 providing that it applies to movements of all cars within the state (except interzone movement excepted in section 8) transported for purposes of sale to or by any dealer "within or without the state." [Appendix A, p. 75.] The statute cannot be said to operate "only indirectly" upon interstate commerce, because the evidence shows that approximately 15,000 automobiles were caravaned into the state [Stipulation, R. 81], whereas the fleet interzone move-

ments within the state were admitted to be only "occasional." [R. 113.] By its terms it operates directly upon both. Now, in *Bourjois Inc. v. Chapman*, 301 U. S. 183, decided by this Court after *Ingels v. Morf*, *supra*, the following rule is expressed:

> "Here, the statute operates directly only upon intrastate commerce. Where interstate commerce is only indirectly affected, it rests upon one challenging the legislation to show actual undue burden upon such commerce. See Pacific Telephone & Telegraph Co. v. Tax Commission, 297 U. S. 403" (at 187-188).

In the *Bourjois Inc.* case states the rule now held to be controlling there is a plain deduction to be drawn that where a statute operates *directly* on *both* interstate and intrastate commerce the burden does not rest upon the one challenging it to show the fees exacted are exhorbitant but upon the defendants, as announced in the *Great Northern Railway* case, *supra*, at 162, which followed the decision in *D. E. Foote & Co. v. Stanley*, 232 U. S. 494, 58 Law Ed. 698, 34 Sup. Ct. 377. We submit such to be the logical conclusion.

But whatever rule may be applied, the fact remains that the defendants in this case (appellants here) undertook to present evidence in support of their claim that the exactions as regards the $7.50 charged for traffic regulation are not excessive. This they did by putting the witnesses Personius, Finch and Greer on the stand [R. 81-105], who testified on this subject as well as along other lines, and by filing the affidavit of Chief Cato [R. 157]. The evi-

dence so presented is somewhat sporadic and is characterized by a lack of definiteness in most instances. The District Court in its opinion stated that "Mr. Cato, chief of the patrol, does not say that a single officer or employee devotes his entire time to the caravaning problem. At the most only Captain Personius and possibly two district officers do so" [R. 39]. A statement from the accounting department was offered for identification [R. 82] and questions were asked Captain Personius concerning various items. He stated that he had nothing to do with the keeping of the books. He also said "I do not know whether those accounts are correctly kept or not" [R. 82]. He testified as to numerous items in the statement and answered some questions by the Court.

In their brief, appellants attempt to coordinate and apply the testimony of Captain Personius [R. 81 *et seq.*] and the affidavit of Chief Cato [R. 157 *et seq.*]. (App. Br. p. 59 *et seq.*). They estimate a total amount of expense as a result of their computation of items discussed in scattered fashion in various portions of the said testimony and affidavit. They give this total as $133,041.00 for annual expense of traffic regulation—a total assumptively attributable to *caravan* traffic. (Brief p. 64.). There is no such sum stated *anywhere* in the evidence. The statement from which the witness Personius testified was not introduced into evidence and is not a part of the record. It is not shown whether this prepared statement set forth any total of expense or not. Personius did not testify as to any total. Neither is there any total sum set forth in Chief Cato's affidavit. In fact the inference seems to be a fair one that because of the indefinite and uncertain factors present in the entire situation all attempts to show any defi-

nite amounts by which they would be willing to stand were avoided by defendants. Chief Cato very frankly stated:

> "It is an almost impossible task to say what portion of the increase in highway patrolmen which was made necessary, was due to caravaning." [R. 163.]

And further on in his affidavit, in discussing the assignments of the men of his department he very bluntly said:

> "Again, it cannot be said what portion of their time is devoted to caravan traffic." [R. 164.]

The trial court was plainly not satisfied that any such substantial amount of expense as that attempted by appellants to be identified with this work was attributable to it. It considered all the evidence before it and weighed the credibility and effect of all matters presented. It was the trial court and that was its province. It could and it was its duty to take into account any vagueness and lack of definite application, and also any inconsistencies and discrepancies having an effect upon the weight or credibility. That it did so is apparent. As an illustration of this, in its opinion the District Court said

> "The officer charged with the enforcement of the act testified that after the enactment of the law *three officers* were assigned to Highway 50 between Carson City, Nevada, and Placerville, California, south of Lake Tahoe. At the same time defendants present the records of the Public Service Commission of the State of Nevada, from which it appears that during the entire eight months, beginning with January 1, 1937, and ending with August 31 of the same year, the period of greatest activity, a total of *only 9 cars* were brought into California for sale over Highway 50." [R. 39-40.] (Italics supplied.)

(The evidence referred to is found in the testimony of Personius [R. 96] and the affidavit of Scott [R. 142, 147], both being parts of appellants' evidence.)

The trial court clearly was neither impressed nor convinced, after careful consideration of the entire presentation. That it acted within its proper sphere in finding as to the facts from the evidence before it need scarcely be stated. That where there is any evidence to sustain a finding of fact by the trial court it will not be disturbed on appeal is likewise elementary. (*Dooley v. Pease,* 180 U. S. 126, 131.) And further, it goes without saying that having proceeded and introduced evidence—whether required to do so or not—appellants are thereafter bound by it.

The District Court's conclusion that the fee demanded and exacted as reimbursement for the expense of enforcing regulations of the interstate commerce was excessive and unreasonably exceeded the outlay required condemns the statute as violative of the commerce clause.

Ingels v. Morf, supra;

Interstate Transit v. Lindsey, supra.

Before leaving the matter of the excessive charge for caravan traffic regulation, two positions taken by appellants in their brief should be clarified and corrected: *First,* throughout their brief they repeatedly state the number of cars charged the fee coming into California annually to be 14,000. By definite stipulation [R. 81] it was agreed that "from January 1, 1935, to November 29, 1935 (approximately an eleven months period) there were 14,000 automobiles caravaned into California for the purpose of sale. . . . The number of cars caravaned into California

since that time per year is approximately in the same proportion." To be exact, this makes the total 15,264, resulting in a total fee of $117,480 from the $7.50 charge, rather than the $105,000 stated by appellants. (App. Br. p. 65.) *Second*, appellants' attempt to explain away the embarrassing effect of the fact that three officers were assigned for caravan traffic duty on the circuitous and mountainous route lying to the south of Lake Tahoe (Highway 50), far less traveled than the main artery, while only nine cars were shown by official records to have been brought into California for sale over the said Highway 50 over a nine months' period during the busiest part of the year. (App. Br. pp. 67, 69.) Appellants' attempted explanation is purely speculative and conjectural and certainly cannot justify their criticism of the Court as having "completely misinterpreted and misunderstood the record." Were we to indulge in less speculative discussion we would direct attention to the fact that the affidavit shows that eight of those nine cars were consigned to Frank E. Buckett & Co. at Fresno, California [R. 147—9th item enumerated in the tabulation] and surmise that the reason these may be known to have traveled the Carson City-Placerville road (Highway 50) is because the drivers thought they could thus more directly and quickly reach Fresno that way than via Truckee, further north; Fresno, as shown on the map contained in appellants' brief (p. 32), being located to the south and west of Carson City, in approximately the center of California. Such an explanation would furnish a complete answer to appellants' doubt,—were any answer or explanation required.

We think that, contrary to appellants' attempted disparagement, the trial court understood the evidence all right,

We wish it to be clearly understood that there is no inclination on the part of appellees to criticize or reflect in any way upon the appellant public officials who seek to defend the statute and justify its attempted treatment of for-sale car transportation. Their attitude is but a natural one. The effort on the part of a public officer to justify and defend the work of his own department is readily understandable, as is his desire to enlarge and increase the importance of the department under his control and management, and we make no criticism of any official attitude.

(2) The Fee Exacted for Use of the Highways Is Invalidated by Arbitrary Discrimination in Favor of Other Cars of Outside Registry.

With reference to the fee for use of the highways, appellants have sought in their brief (App. Br. p. 67) to dismiss all consideration of the discrimination between the cars brought in by those affected by the statute and all other cars of outside registry coming into the state. We do not, in this connection, address ourselves to the relation of the amount of the fee charged to the value of the privilege, or to relationship to costs of highway construction or maintenance, there being no direct evidence upon these questions. We do emphasize, however, that the charging of for-sale cars driven singly and the exemption of other outside-registry cars constitutes such arbitrary discrimination as to clearly invalidate the charge exacted for the privilege of using the highways.

As stated by appellants, over 500,000 non-resident vehicles annually enter California which are not required to pay the fee prescribed by the Caravan Act, to be exact 505,943 in 1937 [R. 39, 166-167]. As stated in the District Court's opinion "From this it appears that the 15,000 cars brought in for sale on their own wheels are not to exceed 1½% of the total number of cars coming over the border in 1937" [R. 39]. And as related to the 3,000 of such cars driven in singly, the percentage is only .6 of one per cent of those of outside registry. (3,000 is a little less than .6% of 505,943.) This .6% is charged the fee and the others are exempted. As pointed out in *Interstate Transit v. Lindsey, supra,* a charge may be imposed as compensation for the privilege of using the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon and "where it is found that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways *or is discriminatory*" [at p. 186]. (Italics supplied.) This is followed by the statement, "But the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity."

We submit that the subjection of these cars to this tax results in nothing less than discrimination, and that whether the charge made bears a relation to the cost of constructing or maintaining the highway or not the very patent discrimination invalidates the charge.

The argument of appellants to the effect that the Legislature must have opined that the state is compensated in some other manner for the use of its highways by these other half million cars coming in annually (App. Br. p. 67) is not persuasive. If by this it is meant to infer that it was deemed more advantageous or more profitable or more compensatory to California and its highways, for example, to admit without charge tens of thousands of needy or destitute persons coming in their outside-registry cars in search of employment than the owner of a car whose sole distinguishing identification is that he is to offer it for sale in the conduct of his business, the illogical and unsupportable effect of the assumption becomes apparent.

We submit that any classification or distinction must be reasonable and must bear a proper relation to the purpose sought to be served. Here the purpose is compensation for the privilege of using the highway. Tested by reasonableness—and there must be some saturation point to that essential element—how can it be said that a compensatory fee can be exacted from six-tenths of one per cent, but that the compensation of the other 99.4% need only be deemed or expected to be forthcoming in some other vague and undefined manner? There is a limit to reasonableness, and transgression of that limit destroys it. Purely arbitrary action then results. No judicial usurpation or invasion of legislative judgment is required or results here when such is found to exist. The attempt reaches such arbitrary proportions and degrees as to condemn it as just what the District Court held it to be—"nothing but discriminatory" [R. 41].

III.

The plea is made by appellants (App. Br. p. 70) that the Court, even though one or even more parts of the statute are invalid, sustain the rest of the act and hold it operative. They point to the usual saving clause (Section 14) found in such statutes. [Appendix A, p. 80.]

Appellants state that by including this provision "the Legislature has thus requested the courts not to annul the act completely." (Brief p. 71.)

The principle of severability is well known and is naturally not challenged, but its application is limited to those cases where the arbitrary action does not characterize and apply to the effect of the entire statute. In *Weller v. People*, 268 U. S. 319, cited by appellants, it was merely held that if one section of a statute which restricted resale prices were eliminated "a workable plan would still remain" (at 325). This is typical of the application of the rule. Here the challange to the validity of the Caravan Law is directed to a fundamental defect, a basic classification so palpably arbitrary as to render the entire statute discriminatory and invalid. Hence, the plea to sever its provisions is unavailing and ineffective as against the basic defect of unconstitutionality.

The statement is made by appellants that by the insertion of the saving clause as to severability the Legislature has requested the courts not to annul the statute completely but if any parts are shown to be invalid only such portions be stricken down, so that its efforts to insure safety through this act may not be totally destroyed, and emphasis is placed upon the recognition by this Court of "the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from

the use of motor vehicles" expressed in the recent case of *H. P. Welch Co. v. State of New Hampshire*, ... U. S. ....., 83 L. Ed. Advance Opinions 363, at 366. Certainly few more important objectives challenge our law makers than such mitigation, and if safety be the object the efforts cannot be too highly lauded. The witness Asher testified, however, that in all his experience of caravaning over 4,000 cars since 1930 he had had but two small claims, each for less than $50.00 [R. 105, 106], and it was stipulated that all the other plaintiffs would testify in substance and effect the same as Mr. Asher [R. 107].

The right which appellees seek to have the Court protect is a substantial thing and is of great importance to them. They ask that their interstate commerce be not unconstitutionally burdened and that they be not discriminated against and denied equal protection of the laws. In other words, they seek the protection of the courts against the penalizing of their business in favor of that of others. Paul Gray, president of the plaintiff Paul Gray, Incorporated, testified that the net profit they make on each transaction involving the transporting of cars into California for sale is "approximately $10.00 per car" [R. 108]. It was stipulated that the rest of the plaintiffs would testify in substance and effect the same [R. 109], and there was no contradictory evidence.

The exaction of the fee imposed by the statute upon their business practically destroys it, while that of others remains unaffected. They seek the protection afforded them by the safeguards of the Constitution.

"The protection against imposition of burdens upon interstate commerce is practical and substantial and

extends to whatever is necessary to the complete enjoyment of the right protected."

Southern Pacific Co. v. Gallagher, ... U. S. .....; 83 L. Ed. Adv. Op. 352, 358.

Equal protection of the laws is denied where reasonableness in a classification is transgressed.

"While reasonable classification is permitted without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed."

Southern Railway Co. v. Greene, 216 U. S. 400, 417.

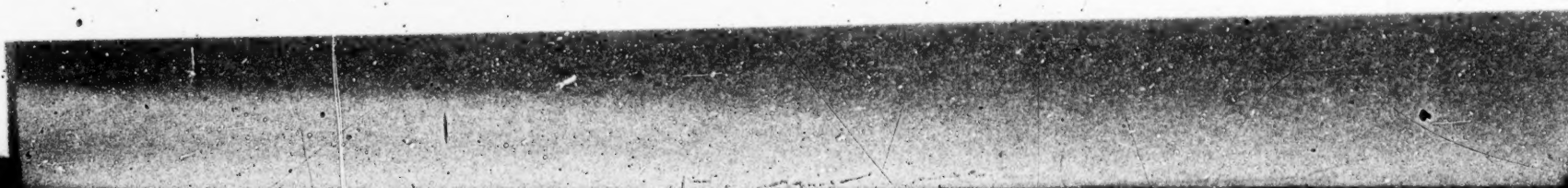
Conclusion.

For the reasons presented herein, which are summarized in the summary of argument on pages 10-11 of this brief, it is respectfully submitted that the action of the District Court in declaring unconstitutional the 1937 California Caravan Law should be sustained and its decree granting a permanent injunction affirmed.

Respectfully submitted,

EVERETT W. MATTOON,
Attorney for Appellees.

Los Angeles, California.



APPENDIX A.

THE 1937 CALIFORNIA CARAVAN LAW.

An act to regulate the caravaning of vehicles upon the public highways of this State, defining the term "caravaning" and providing for the licensing of vehicles in caravan for the privilege of using the public highways and for the cost of regulating persons engaged in caravaning and providing such fees shall be a lien and for the enforcement of such liens and the collection and disposition of such fees and imposing penalties for violation thereof, and to repeal an act entitled "An act to regulate the caravaning of motor vehicles upon the public highways of this State, defining the term "caravaning" and providing for the licensing of motor vehicles in caravan and imposing penalties for violation thereof," approved July 6, 1935, declaring the urgency thereof, and providing that it shall take effect immediately.

(Chapter 788, Statutes of 1937. In effect July 2, 1937.)

SECTION 1. The term "caravaning" as used in this act shall mean the transportation of any vehicle of a type subject to registration under the Vehicle Code, operated on its own wheels, or in tow of a motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser, whether such agent, dealer, purchaser or prospective purchaser may be located within or without this State.

SEC. 2. The term "dealer" when used in this act shall mean and include every individual, partnership, corporation or trust whose business in whole or in part is that of caravaning new or used vehicles as herein defined, or of selling or exchanging new or used vehicles, and shall in-

clude every agent or representative of every such person engaged in such business, except that nothing herein contained shall be construed to require the performance of any act or the payment of any fee by any agent or representatives which has previously been performed or paid by his principal.

SEC. 3. No person, firm or corporation, shall use any highway in this State for caravaning vehicles unless and until there shall first have been secured from the Motor Vehicle Department of the State of California upon application at its office in Sacramento or any of its regularly established branch offices other than stations at the State boundary line a special permit as to each vehicle so caravaned, for use of the highways of this State in caravaning such vehicles, which permit shall be displayed by posting the same upon the windshield of such vehicle or in other prominent place thereon where it may be readily legible.

SEC. 4. As a condition precedent to the use of the highways of this State for the purpose of caravaning and the issuance of any special permit provided for in the previous section of this act, the Motor Vehicle Department of the State of California shall charge and collect, for each vehicle for which a caravan permit may be issued whether such vehicle be operated under its own power or in tow of a motor vehicle, a fee of seven and fifty one-hundredths dollars as compensation for the privilege of using the public highways of this State and a fee of seven and fifty one-hundredths dollars to reimburse the State for expense incurred in administering police regulations pertaining to the operation of vehicles moved pursuant to such permits and to public safety upon the highways as affected by such operation.

SEC. 5. Permits issued pursuant to the provisions of this act shall be valid for a period of six months after date of issuance and shall be valid only in the hands of the original permittee but shall not authorize the operation of any vehicle other than that for which originally issued. Such permit shall contain such information and be in such form and shall be issued under such rules and regulations as may be prescribed by said Motor Vehicle Department.

SEC. 6. The fee paid for any caravaning permit issued under this act shall be in lieu of all other registration fees and license fees for the use of public highways in this State by such vehicle during the period that such vehicle may be operated for the purpose of sale or exchange under and solely in accordance with such permit upon the public highways of this State; provided, however, that nothing in this section shall exempt the owner or operator of such vehicle from compliance, except with respect to fees or license charges, with all laws of this State now or hereafter adopted, relating to safety in the use of the public highways.

SEC. 7. All fees from the issuance of permits provided for under this act shall be collected by the Motor Vehicle Department. One-half of such fees shall be paid into and become a part of the motor vehicle fund in the State treasury, and are hereby appropriated out of said fund for the support of the Department of Motor Vehicles; provided however, that should a motor vehicle support fund be created in the State treasury said one-half of such fees shall be paid into and become a part of said motor vehicle support fund. The remainder of such fees shall be paid into and become a part of the State highway fund in the

State treasury. The moneys so derived by the State are intended as compensation for the privilege of using the highways of this State and to reimburse the State Treasury for the added expense which the State may incur in the collection of such fees and in the administration and enforcement of this act and the expense of policing the highways over which such caravaning may be conducted.

SEC. 8. The provisions of this act shall not apply to the transportation of motor vehicles between points within Zone 1 or between points within Zone 2, which zones are hereby defined as follows:

ZONE 1—That part of the State of California lying within the counties of San Diego, Imperial, Orange, Riverside, San Bernardino, Los Angeles, Ventura, Santa Barbara, San Luis Obispo, Kern and Inyo;

ZONE 2—That part of the State of California not included within Zone 1 as herein defined.

SEC. 9. Every dealer in vehicles shall report to and list with the Motor Vehicle Department on forms to be prescribed by such department and in accordance with rules in regard thereto promulgated by such department, each vehicle received, held or offered by him for sale which has been caravaned over the public highways of this State. Such report and listing shall be made forthwith upon the receipt of such vehicle. Such report, among other things, shall show the number of the caravan permit authorizing the operation of the vehicle covered in such report. In the event no permit has been secured for such operation payment of the required fees and penalty shall be made to the department and shall accompany such report. In the event permit fees required by this act are not paid when due a

penalty of fifty per cent of such fees for each such vehicle shall be assessed and collected by the department.

SEC 10. On demand of the Motor Vehicle Department, any dealer in vehicles shall furnish to the department evidence as to the origin of any vehicle not previously registered in this State which is held or offered by him for sale, and evidence of the manner in which such vehicle was transported to the place in which it is or has been held or offered for sale. It shall be prima facie evidence that a vehicle not previously registered in this State is or has been transported for purpose of sale if it is exchanged, sold or offered for sale within thirty days after it has been operated over the public highways of this State.

SEC 11. The permit fees provided for herein shall be due and payable in advance of the operation upon the public highways of any vehicle for which such permit is required and shall be a lien against the vehicle for which they are due during the time such vehicle is held for sale or offered for sale or resale.

SEC 12. The department shall collect the permit fees and enforce the liens provided for herein by seizure of the vehicle or vehicles upon which such fees are a lien from the person or persons in possession thereof, if any, and by sale of such vehicle. The seizure and sale herein authorized may be made at any time after such fees become due and shall be conducted and carried out by the department in the same manner as is provided by law for the seizure and sale of personal property by the assessor for the collection of taxes due on personal property.

SEC. 13. Violation of any of the provisions of this act is a misdemeanor punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

SEC. 14. If any section, paragraph, clause or phrase of this act should be held to be unconstitutional by any court of competent jurisdiction such holding shall not affect any other part of this act and it is hereby declared to be the intention of the Legislature that no section, paragraph, sentence, clause or phrase of this act has been an inducement to the enactment of any other part hereof.

SEC. 15. An act entitled "An act to regulate the caravaning of motor vehicles upon the public highways of this State, defining the term "caravaning" and providing for the licensing of motor vehicles in caravan and imposing penalties for the violation thereof," approved July 6, 1935, is hereby repealed.

SEC. 16. This act is hereby declared to be an urgency measure within the meaning of Section 1 of Article IV of the Constitution, necessary for the immediate preservation of the public peace, health and safety and as such shall take effect immediately.

The following is a statement of facts constituting such necessity:

Experience has shown that, due to climatic conditions, the caravaning of vehicles occurs almost exclusively during the spring and summer months. It is necessary, therefore, in order to regulate caravan vehicles, the number of which is now increasing, that this act shall take effect immediately.

APPENDIX B.

THE 1935 CALIFORNIA CARAVAN LAW.

An act to regulate the caravaning of motor vehicles upon the public highways of this State, defining the term "caravaning" and providing for the licensing of motor vehicles in caravan and imposing penalties for violation thereof.

(Chapter 402, Statutes of 1935.)

SECTION 1. The term "caravaning" as used in this act shall mean the transportation from without the State of any motor vehicle operated on its own wheels, or in tow of another motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, manufacturers' representative, purchaser or prospective purchaser, whether such agent, dealer, manufacturers' representative, purchaser or prospective purchaser may be located within or without this State. The caravaning of motor vehicles as herein defined shall be considered as the transportation of property for hire by motor vehicle and shall be subject to all the laws of this State relative to the transportation of property for hire by motor vehicle upon the public highways of this State.

SECTION 2. No person, firm or corporation shall use any highway in this State, for caravaning motor vehicles unless and until there shall first have been secured from the Motor Vehicle Department of the State of California a special permit as to each vehicle so caravaned, for use of the highways of this State in caravaning such vehicle, which permit shall be displayed by posting the same upon the windshield of such vehicle or in other prominent place thereon where it may be readily legible. It shall be unlawful to operate three or more vehicles or groups

of vehicles in caravans unless a space of at least one hundred fifty feet shall at all times be maintained between each vehicle of group of vehicles being so caravaned.

SEC. 3. As a condition precedent to the issuance of any special permit provided for in the previous section of this act the Motor Vehicle Department of the State of California shall charge and collect a fee of fifteen dollars for each motor vehicle for which a caravan permit may be issued, whether such vehicle be operated under its own power or in tow of another motor vehicle; provided, however, that no such permit shall be issued by said Motor Vehicle Department unless and until the applicant therefor shall have produced evidence to the satisfaction of said Motor Vehicle Department that all of the laws of this State relating to the transportation of property upon the public highways therefor for hire shall have been complied with.

SEC. 4. No permit issued under this act for caravaning motor vehicles or vehicles shall be transferable either as between persons or as to the vehicle for which it is issued, and shall only be valid for the trip or trips to be specified in said permit, and in no event shall such permit be valid for a period of more than ninety days after it shall have been issued. Such permit shall contain such information and be in such form and shall be issued under such rules and regulations as may be prescribed by said Motor Vehicle Department. Such permit shall be conditioned upon the permittee complying with all laws of the State of California and the United States.

SEC. 5. The fee paid for any caravaning permit issued under this act shall be in lieu of all other registration fees and license fees for the use of public highways in

motor vehicle may be operated under and in accordance with such permit upon the public highways in this State; provided, however, that nothing in this section shall exempt the owner or operator of such vehicle from compliance, except with respect to fees or license charges, with all laws of this State now or hereafter adopted, relating to the transportation of property for hire.

SEC. 6. All fees from the issuance of permits collected by the Motor Vehicle Department under this act shall be paid into the general fund in the State treasury.

Said department shall file with the Controller on or before February first and August first of each year a detailed account of the receipts of said Department from this source for the six months next preceding. The moneys so derived by the State are intended to reimburse the State treasury for the added expense which the State may incur in the administration and enforcement of this act and the added expense of policing the highways over which such caravaning may be conducted, so as to provide for the safety of traffic on such highways where caravaning is being conducted.

SEC. 7. Violation of the provisions of section 2 or of section 4 of this act is a misdemeanor punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

SUPREME COURT OF THE UNITED STATES.

No. 534.—October Term, 1938.

Frank W. Clark, as Director of the Department of Motor Vehicles of the State of California, et al., Appellants, *vs.* Paul Gray, Inc., Al Asher, and Hirsch Mercantile Company, et al.	Appeal from the District Court of the United States for the Southern District of California.

[April 17, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

The principal questions for decision are whether the California Caravan Act of 1937, exacting fees aggregating $15 for each automobile driven into the state for sale, imposes a forbidden burden on interstate commerce or infringes the due process or equal protection clauses of the Fourteenth Amendment.

This is an appeal under §§ 238(3), 266 of the Judicial Code, 28 U. S. C. §§ 345(3), 380, from a final decree of the district court for southern California, three judges sitting, enjoining appellants, officers of the State of California, from enforcing the license and fee provisions of Chapter 788, p. 2253, California Statutes of 1937. *Gray* v. *Ingels*, 23 F. Supp. 946.[1]

The statute, known as the Caravan Act, was enacted as a substitute for the Caravan Act of 1935, c. 402, Cal. Stat. 1935, held invalid in *Ingels* v. *Morf*, 300 U. S. 290, as an infringement of the commerce clause. "Caravaning" is defined in § 1 of the present Act as the "transportation of any vehicle . . . operated on its own wheels, or in tow of a motor vehicle, for the purpose of selling or offering the same for sale . . . within or without this

[1] The suit was begun July 14, 1937, before the enactment of the amendment to §24 of the Judicial Code, 50 Stat. 738, providing that "no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State." Section 2 of the Act excludes from its operation suits begun in the district courts before its enactment.

State." Sections 4, 5 and 6 exact in lieu of all other fees two license fees, each of $7.50, for a six months permit for caravaning a vehicle on the state highways. One of these is "to reimburse the State for expense incurred in administering police regulations pertaining to the operation of vehicles moved pursuant to such permits and to public safety upon the highways as affected by such operation"; the other is declared to be "compensation for the privilege of using the public highways". Section 8 excepts from the operation of the statute vehicles moving wholly within either of two zones which are approximately the northern and southern halves of the state. Other sections of the Act make provision for the issuance of licenses and the collection of fees. Section 12 provides for the collection of fees by seizure and sale of vehicles transported in violation of the Act, and § 13 prescribes criminal penalties for violation.

Appellees, numerous individuals, copartnerships and corporations, joined in bringing the present suit against appellants, state officers charged with the duty of enforcing the Act, alleging that each appellee had driven and would in the course of business drive automobiles into California for the purpose of sale. They prayed an injunction restraining appellants from collecting the fees and enforcing the provisions of the statute in aid of their collection. The district court's findings state that the amount involved in the action is in excess of the sum of $3,000; that each of appellees, in the course of business of selling motor cars, purchases cars previously registered in other states and "caravans" them into the state of California; that cars for sale are often moved between points in a state zone; that the operation of cars in caravans does not create an additional hazard or a traffic problem necessitating special policing of the caravans and that the caravaning of cars does not create undue wear and tear on the highways of the state; that the fees charged are excessive and bear no relation to the added expense to the motor vehicle department of policing the highways of the state of California; and that they are disproportionate to other taxes or license fees charged by the state for the use of the highways. The court concluded that the statute discriminated against interstate commerce, deprived appellees of their property without due process, and denied to them equal protection of the laws, in that it applies only to those using the highways for the transportation of motor vehicles for the purposes of sale and does

ot apply to other persons using the highways under comparable ircumstances.

Appellants assail here the findings of fact of the court below on hich it predicated its conclusion of unconstitutionality, and insist hat upon the evidence there is no basis for the conclusion that the ees exacted are excessive or that there is discrimination against nterstate commerce or a denial of equal protection or due process.

URISDICTION OF THE DISTRICT COURT.

A motion of appellants in the court below to dismiss the bill of omplaint for want of the jurisdictional amount was withdrawn, nd the jurisdiction of the district court is not challenged here. But on the argument, it appearing doubtful whether the "matter in ntroversy" exceeded "the sum or value of" $3,000, § 24(1) of the Judicial Code, 28 U. S. C. § 41(1), we raised the question whether he jurisdictional amount was involved, as was our duty. *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 382; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 13; *St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 287, note 10. The bill of complaint alleges generally that "the amount involved in this litigation is in excess of Three Thousand Dollars ($3,000.00), exclusive of interest and costs". But it is plain that this allegation is insufficient to satisfy jurisdictional requirements where there are numerous plaintiffs having no joint or common interest or title in the subject matter of the suit. As the bill of complaint shows on its face, and as the findings establish, each appellee maintains his own separate and independent business, which is said to be affected by the challenged fees. No joint or common interest of appellees in the subject matter of the suit is shown. Cf. *Gibbs* v. *Buck*, No. 276, decided this day.

It is a familiar rule that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy jurisdictional requirements. *Wheless* v. *St. Louis*, 180 U. S. 379; *Rogers* v. *Hennepin County*, 239 U. S. 621; *Pinel* v. *Pinel*, 240 U. S. 594; *Scott* v. *Frazier*, 253 U. S. 243. The general allegation in the bill of complaint that "the amount involved in this litigation is in excess of" $3,000 and the finding of the court that "the amount involved in the within action" ex-

ceeds the jurisdictional amount, give no indication that the amount in controversy with respect to the claim of any single plaintiff exceeds the jurisdictional amount and are insufficient to show that the district court had jurisdiction of the cause. *Pinel* v. *Pinel*, *supra*.

Examination of the record shows that only in the case of a single appellee, Paul Gray, Inc., is there any allegation or proof tending to show the amount in controversy. As to it the bill of complaint alleges that "it causes to be caravaned into the said state . . . approximately one hundred fifty (150) automobiles each year". This allegation is supported by evidence that this appellee is regularly engaged in the business and tending to show that its volume exceeded that amount when the act went into effect July 2, 1937. Since the amount in controversy in a suit to restrain illegal imposition of fees or taxes is the amount of the fees or taxes which would normally be collected during the period of the litigation, *Healy* v. *Ratta*, 292 U. S. 263, we cannot say, upon this state of the record, that jurisdiction was not established as to appellee Paul Gray, Inc.

We ignore affidavits filed here for the purpose of supplementing the record by showing the amount in controversy as to another appellee. While it has been the practice of this Court to receive affidavits for the purpose of establishing its own appellate jurisdiction under statutes prescribing that a specified amount in controversy is prerequisite to the appeal, *Williamson* v. *Kincaid*, 4 Dall. 19; *Rush* v. *Parker*, 5 Cranch 287; *Roura* v. *Philippine Islands*, 218 U. S. 386; see *Red River Cattle Co.* v. *Needham*, 137 U. S. 632, that procedure is inapplicable here. Our review of the action of the district court in assuming jurisdiction is confined to the record before the district court. *Henneford* v. *Northern Pacific Railway*, 303 U. S. 17.

Proper practice requires that where each of several plaintiffs is bound to establish the jurisdictional amount with respect to his own claim, the suit should be dismissed as to those who fail to show that the requisite amount is involved.[2] Otherwise an appellate court

[2] A different question is involved in the case of a creditor's bill to liquidate an insolvent corporation for the benefit of all creditors. There his claim must exceed the jurisdictional amount. Lion Bonding Co. v. Karatz, 262 U. S. 77. But creditors whose claims are less may be made parties because of their interest in a fund brought within the jurisdiction of the court. Gibson v. Shufeldt, 122 U. S. 27; Handley v. Stutz, 137 U. S. 366; National Bank of Commerce v. Allen, 90 Fed. 545, 555-556.

could be called on to sustain a decree in favor of a plaintiff who had not shown that the claim involved the jurisdictional amount, even though the suit were dismissed on the merits as to the other plaintiffs who had established the jurisdictional amount for themselves. Although it appears that such a result could not follow here, we think it better practice to dismiss the suit for want of the jurisdictional amount as to all appellees except Paul Gray, Inc. See *Rich* v. *Lambert*, 12 How. 347; *Ex parte Baltimore & Ohio Railroad*, 106 U. S. 5; *Hassall* v. *Wilcox*, 115 U. S. 398. Cf. *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233.

DISCRIMINATION.

Apart from appellees' insistence that the fees are an unconstitutional burden on interstate commerce because excessive, the substance of their contention is that the statute discriminates between automobiles transported into the state singly and those similarly transported intrazone, for which no fee is charged, and also that the statute discriminates between those cars driven by appellees in caravans and those similarly driven wholly within either of the state zones, for which no fee is charged.

In *Morf* v. *Bingaman*, 298 U. S. 407, we had occasion to consider the validity of a fee or tax exacted by New Mexico for the transportation into the state of any motor vehicle for the purpose of sale within or without the state. It there appeared that the plaintiff, with others, was engaged in transporting motor cars on their own wheels in caravans across the State of New Mexico for the purpose of sale, and that their transportation for that purpose had resulted in the creation of a distinct class of motor vehicle traffic of considerable magnitude. In the course of this business second-hand cars purchased at points in the east are assembled in caravans, which are driven as such to the point of sale in California. Large numbers of the cars are coupled in twos, each two in charge of a single driver who operates the forward car and controls the movement of both by the use of the mechanism and brakes of one. The drivers of caravans, except two or three regularly engaged, are casually employed and serve without pay or for small compensation in order to secure transportation to the point of destination. We said, page 411-412:

"The Legislature may readily have concluded, as did the trial court, that the drivers have little interest in the business or the vehicles they drive and less regard than drivers of state licensed

cars for the safety and convenience of others using the highways. The evidence supports the inference that cars thus coupled and controlled frequently skid, especially on curves, causing more than the usual wear and tear on the road; that this and other increased difficulties in the operation of the coupled cars, and the length of the caravans, increase the inconvenience and hazard to passing traffic. . . . There is ample support for a legislative determination that the peculiar character of this traffic involves a special type of use of the highways, with enhanced wear and tear on the roads and augmented hazards to other traffic, which imposes on the state a heavier financial burden for highway maintenance and policing than do other types of motor car traffic. We cannot say that these circumstances do not afford an adequate basis for special licensing and taxing provisions, whose only effect, even when applied to interstate traffic, is to enable the state to police it, and to impose upon it a reasonable charge, to defray the burden of this state expense, and for the privilege of using the state highways."

The State of California has found it expedient to adopt licensing provisions for this class of traffic and to exact the fees specified in the statute for the use of its highways and the expense of policing. That this peculiar type of traffic occurs in large volume between eastern points and points in California, and that there is basis for the legislative judgment that the traffic imposes special burdens on the use of the state highways for which a special charge may be made, are abundantly supported by the record. The parties have stipulated that fifteen thousand automobiles are brought into the state for sale annually. Of these, from 80 to 90 per cent. come in caravans or convoys, and of the cars so moving one-half are coupled together in twos. It further appears by stipulation that the caravans or convoys are made up of from nineteen to twenty-five cars.

There is much evidence in the record indicating that it is the long haul traffic in cars for sale in California which tends to produce the movement in large caravans or convoys in order to save expense of transportation, and which in turn tends to impose special burdens on the state in connection with the use of its highways, calling for the imposition of regulations and fees different from those applied to other types of motor car movement. Without repeating what was said more at length of like traffic in *Morf v. Bingaman, supra*, the evidence in the present case shows that coupled cars, under control of a single driver, subject the highways to increased wear and tear because of their tendency to skid and sway on curves and in passing other traffic, and that the length of the caravans and the inefficiency and irresponsibility of the drivers

casually employed, increase traffic congestion and the inconveniences and hazards of automobile traffic. These circumstances have caused the state to make increased provision for the policing of the traffic. It is true that the district court found that the practice of caravaning creates no additional traffic hazard, nor any undue wear and tear on the highways. But in this we think that its determination was not only contrary to the evidence, but went beyond the judicial province.

It is no longer open to question that the states have constitutional authority to exact reasonable fees for the use of their highways by vehicles moving interstate, *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160; *Clark* v. *Poor*, 274 U. S. 554; *Sprout* v. *South Bend*, 277 U. S. 163; *Morf* v. *Bingaman, supra; Dixie Ohio Express Co.* v. *State Revenue Comm'n*, decided January 30, 1939, and that for that purpose they may classify the vehicles according to the character of the traffic and the burden it imposes on the state by that use, and charge for the use a fee not shown to be unreasonable or excessive. *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 370-371; *Hicklin* v. *Coney*, 290 U. S. 169; *Morf* v. *Bingaman, supra*, 413; *Dixie Ohio Express Co.* v. *State Revenue Comm'n, supra.*

The classification of the traffic for the purposes of regulation and fixing fees is a legislative, not a judicial, function. Its merits are not to be weighed in the judicial balance and the classification rejected merely because the weight of the evidence in court appears to favor a different standard. Cf. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 299. The determination of the legislature is presumed to be supported by facts known to it, unless facts judicially known or proved preclude that possibility. *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 263; s. c. 11 F. Supp. 599, 600; *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 191-192; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 153-154. Hence, in passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis. This is equally the case where the classification, which is one which the legislature was competent to make, is applied to vehicles

using the state highways in interstate commerce. *South Carolina Highway Department* v. *Barnwell Bros.*, *supra*, 187 *et seq.* The legislature must be assumed to have acted on information available to courts, and where, as here, the evidence, like that discussed in *Morf* v. *Bingaman, supra,* shows that it is at least a debatable question whether the traffic in caravans involves special wear and tear of the highways and increased traffic hazards requiring special police control, decision is for the legislature and not the courts. *Standard Oil Co.* v. *Marysville, supra; South Carolina Highway Department* v. *Barnwell Bros., supra.*

Appellee Paul Gray, Inc., so far as appears, caravans its cars for sale in California from Detroit, Michigan, and St. Joseph, Missouri. Its cars, like those of the other appellees, move in caravans of from nineteen to twenty-five cars. It does not appear, nor is it contended, that this appellee transports any cars singly. From what has been said it is evident, as was decided in *Morf* v. *Bingaman, supra,* that cars moving in caravans of the type described constitute a special class of traffic which may be taxed or charged for differently from other classes without infringing the equal protection clause.

The argument that the statute denies equal protection to appellees because it exacts fees for cars transported into the state for sale singly but none for cars which move similarly intrazone or for those which enter the state not for purposes of sale, ignores the actual circumstances in which the statute is applied to appellees, as shown by the record, and seeks to take advantage of an alleged discrimination which, if it exists, does appellees no harm. The Fourteenth Amendment does not require classification for fees more than for taxation, to follow any particular form of words. If that adopted results in the application of the exaction to a class which may be separately charged without a denial of equal protection, those within the class cannot complain that it might have been more aptly defined or that the statute may tax others who are not within the class. See *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Silver* v. *Silver*, 280 U. S. 117, 123; *Morf* v. *Bingaman, supra*, 413.

It is the practice of transporting automobiles for long distances over the highway for purpose of sale which has given rise to the practice of moving them in caravans. The use of automobiles for other purposes, or for pleasure, does not have that result. The

classification of the statute, in its practical application, embraces and is constitutionally applicable to cars moving in caravans, the class of traffic in which appellee Paul Gray, Inc., engages and on which it is alone taxed. One form of discrimination of which it complains is that fees are exacted for cars driven into the state singly for sale but not for those driven singly to market intrazone or singly from without the state for other purposes. Appellee does not show that it belongs to either class, and so far as the traffic in which it participates is properly taxed, it cannot complain of the imposition of the charge on a business which it does not do.

So far as appellees complain that no fee is exacted for cars which move for sale intrazone in caravans, different considerations apply. As we have said, it is the long haul of cars for sale which has produced motor vehicle caravans and has made them a special class for the purposes of regulation and imposition of fees. It was for the legislature to consider and decide whether the actual conditions which prevail in the state, affecting movement of cars for sale, eliminate or so reduce the burden of the caravan traffic on the highways as to call for a different classification of the short haul traffic for the purposes of regulation and fees. The legislature having made its classification by the establishment of zones, in the light of special conditions in the state, courts are not free to set aside its determination unless they can say that it is without any substantial basis. *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 73; *Continental Baking Co.* v. *Woodring, supra; Sproles* v. *Binford*, 286 U. S 374; *Hicklin* v. *Coney, supra; Aero Mayflower Transit Co.* v. *Public Service Comm'n*, 295 U. S. 285.

The trial court found that cars are often moved in convoys in Zone 1, which includes the metropolitan area of Los Angeles, and it thought this sufficienct to establish an unlawful discrimination without consideration of the other conditions affecting the intrazone traffic. The evidence establishes, beyond any reasonable doubt, that the movement intrazone of cars for sale in convoys similar to that of appellees is negligible and that the principal sources of cars for sale moving intrazone are the assembly plants of automobile manufacturers located in or near the metropolitan areas of Los Angeles and San Francisco. Being new cars, the bulk of them, shipped interstate or to distant points intrastate, move by rail, water, or truck. Most of those which move on their own wheels are driven relatively short distances, seventy-five

miles or less, in the metropolitan area over highways of more than two lanes, as distinguished from caravans coming from without the state, which move for long distances over two-lane highways in mountain districts. The proportion driven singly does not appear. Such convoys or caravans as there are usually consist of two or three cars. The evidence discloses no case of more than four. Coupling is negligible. Each car is in charge of a regularly employed and licensed driver. The intrazone movement is subject to other licensing and taxing provisions of the state law, and no showing is made that the differences in fees or taxes exacted from the two classes of traffic do not bear a fair relationship to the differences in the burden of the traffic for which the state must provide.

The legislature could reasonably have concluded that the wear and tear and injury to the highways from driving coupled cars intrazone was negligible, and that the relatively short distances which cars are driven in twos or threes, the character of the highways used, and the difference in the class of drivers, taken together, eliminate from the intrazone traffic or so substantially reduce the burden imposed by traffic like that of appellees moving interstate or interzone as to require, in fairness, a different classification for the purpose of fees charged for the use of the highways. We cannot say that that conclusion is without support or infringes the principles which we have repeatedly recognized as defining the power of the states, in the absence of Congressional action, to classify vehicles or traffic for the purposes of regulating use of the highways by vehicles moving interstate. If the classification with respect to a matter remaining within state control, despite the commerce clause, is otherwise valid, it is not any the less so because it affects interstate commerce. See *South Carolina Highway Department* v. *Barnwell Bros., supra*, 191-192, and cases cited. As the state has authority to charge a reasonable fee for the use of its highways, and as the classification of the traffic which the state has made for the purpose of fixing the fees is valid, the only remaining question is whether the fees which it has fixed must be deemed excessive.

REASONABLENESS OF THE FEES.

In *Ingels* v. *Morf, supra*, the $15 fee charged under the California Act of 1935 for driving a car into the state for purpose of sale was contested as excessive. There the statute declared that the fee was "intended to reimburse the State treasury for the added

expense which the State may incur in the administration and enforcement of this act and the added expense of policing the highways over which such caravaning may be conducted, ..." and the automobile owner assumed and by proof sustained the burden of showing that the charge made for the precise purposes defined by the statute was excessive. We accepted the evidence as establising that the cost of issuing caravan permits was about $5 per car and as supporting the finding of the trial court that the cost of policing did not exceed $5 a car. And we concluded that the total cost of administration and policing was substantially less than the $15 fee charged.

Here a fee of $7.50 is collected for administration and enforcement of the Act and a fee of like amount is charged for the use of the highways. Appellees have offered no proof that either of the fees is too large, although the burden rested upon them to show that the fees were excessive for the declared purposes. *Hendricks* v. *Maryland, supra,* 624; *Interstate Busses Corporation* v. *Blodgett,* 276 U. S. 245, 251; *Morf* v. *Bingaman, supra,* 410; *Ingels* v. *Morf, supra,* 296. *Great Northern Railway* v. *Washington,* 300 U. S. 154, is not to the contrary.

Appellants, without abandoning their position that the burden of proof rests on appellees, offered evidence to show that the costs of administration and policing proved in *Ingels* v. *Morf, supra,* were incomplete. Due to the nature of the case much of the proof is inexact and speculative. But there is evidence that thirty-nine officers devoted part or all of their time to enforcing the 1937 Act. The expense of operating their automobiles and motorcycles is considerable; an increased burden is imposed upon the personnel of the border police stations; and some increase in clerical force and in expenditures for stationery and miscellaneous items has been required. Investigations of attempted evasions increase the unit cost above that of other types of traffic. The total of these added expenses, as computed by appellants at about $133,000 annually, certainly approximates the amount of the revenue derived from the fees. The aggregate of the fees collected during eleven months for 14,000 cars at $7.50 each is $105,000. Appellees do nothing to challenge this evidence, and they point to no specific errors in the estimates or computation upon which appellants calculate the costs.

The state is not required to compute with mathematical precision the cost to it of the services necessitated by the caravan traffic. If

the fees charged do not appear to be manifestly disproportionate to the services rendered, we cannot say from our own knowledge or experience that they are excessive. *Kane* v. *Maryland, supra,* 168; *Interstate Busses Corp.* v. *Blodgett, supra,* 251, 252; *Morf* v. *Bingaman, supra; Dixie Ohio Express Co.* v. *State Revenue Comm'n, supra;* see *Patapsco Guano Co.* v. *North Carolina,* 171 U. S. 345, 354; *McLean* v. *Denver & Rio Grande R. Co.,* 203 U. S. 38, 55; *Interstate Transit, Inc.* v. *Lindsey,* 283 U. S. 183, 186. Appellees have failed to sustain the burden of proof that either of the fees is excessive for the purpose for which it is collected.

The trial court seems to have thought, as appellees argue, that unreasonableness of the fees was established by proof that the same fees are not imposed on other classes of traffic. But since, as we have seen, there is basis for the classification of the traffic, there is basis for a difference in fees charged the different classes. *Hendrick* v. *Maryland, supra; Interstate Busses Corp. v. Blodgett, supra.* Appellees have laid no foundation for any contention that there are not compensating differences in the traffic comparable to the difference in fees, or for impeaching the legislative judgment that those specified are fairly related to the traffic to which they are applied.

The cause will be reversed with instructions to the district court to dismiss the case as to appellee Paul Gray, Inc., on the merits, and to dismiss as to the other appellees for want of jurisdiction.

So ordered.

Mr. Justice BLACK is of the opinion that the case should be dismissed for want of jurisdiction as to all the appellees.

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